93-881

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

IN RE GARY HAUGEN,

Debtor/Petitioner.

IN RE HAUGEN CONSTRUCTION SERVICES, INC.,

Debtor.

GARY HAUGEN, individually; GARY HAUGEN, d/b/a/ HAUGEN CONSTRUCITON; GARY HAUGEN, d/b/a PROPERTY INVESTORS; GARY HAUGEN d/b/a HAUGEN FARMS; GARY HAUGEN, d/b/a other trade names presently unknown to Plaintiff; MINOT SAND & GRAVEL, INC., a North Dakota corporation; HAUGEN DEVELOPMENT, INC., a North Dakota corporation; and XYZ Corporation, a corporation or corporations whose true identity is presently unknown to Plaintiff,

Defendants/Petitioners,

vs.

BUTLER MACHINERY, INC., on behalf of itself and all others similarily situated,

Plaintiff/Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the principles of "Full Faith and Credit" and "Res Judicata" prevent the Court of Appeals from deciding an issue that was previously decided by the North Dakota State Court under a Bankruptcy Court abstention order?

2. Can interest flow on a judgment under 11 USC § 506(b) when that judgment did not conclusively establish the amount due, and when liability arose from a derivative proceeding where interest was stayed?

3. Can the Court of Appeals alter liability and damages on a collateral unappealed judgment that became final years ago and now obligate the judgment debtor to pay the separate and unrelated bankruptcy costs of a third party?

PARTIES

In re Gary Haugen, Debtor[1] (Petitioner).

In Re Haugen Construction Services, Inc., Debtor.

Gary Haugen, individually; Gary Haugen d/b/a Haugen Construction; Gary Haugen, d/b/a Property Investors; Gary Haugen d/b/a Haugen Farms; Gary Haugen, d/b/a/ other trade names presently unknown to Plaintiff; Minot Sand & Gravel, Inc., a North Dakota corporation; Haugen Development, Inc., a North Dakota corporation; and XYZ Corporation, a corporation or corporations whose true identity is presently unknown to Plaintiff, Petitioners, vs. Butler Machinery, Inc., on behalf of itself and all others similarly situated, Respondent. Appellants are affiliated by reason of being found alter egos of Haugen Construction Services, Inc.

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[1] Gary Haugen died during the pendency of the bankruptcy proceedings, and the bankruptcy proceedings are carried on by his administrators, Dale Pietsch and Joyce Fjeldahl. For ease of communication and understanding, we are referring to Haugen as the real party in interest. (All prior proceedings were in the name of Gary Haugen.)

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Petitioners respectfully pray that a writ of certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit that was entered in this matter on the 22nd day of July, 1993. A Petition for Rehearing was denied on September 8, 1993.

OPINIONS BELOW

The July 22, 1993, opinion of the Court of Appeals of the Eighth Circuit, whose Judgment is herein sought to be reviewed is reported at 998 F2d 1442 and is reprinted in a separate appendix to this Petition (Appendix page 1). The prior opinions of the United States District Court for the District of North Dakota and the Bankruptcy Court for the District of North Dakota are also reprinted in the appendix (Appendix pages 86, 72, 80). The August 8, 1991, opinion of the North Dakota State District Court which interrelates and decides several of the issues considered in the foregoing federal opinions and redecided by the Court of Appeals are reprinted in the Appendix (Appendix page 63).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 22, 1993, and filed and entered with the District Court on September 20, 1993. Petition for Rehearing was denied on September 8, 1993. The jurisdiction of this Court is invoked pursuant to 28 USC, § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 11 USC § 502(b)(2), 11 USC § 503(b)(1)(A)(B), 11 USC § 506(b), 28 USC § 1334(c), 28 USC § 1738, and 28 USC § 157(c).

11 USC § 502(b)(2)

> Except as provided in subsections, (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in lawful currency of the United States in such amount, except to the extent that – . . . (2) such claim is for unmatured interest;

11 USC § 503(b)(1)(A)(B)

> After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title [11 USCS § 502(f)], including-(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;
>
> (B) any tax –
>
> > (i) incurred by the estate, except a tax of a kind specified in section 507(a)(6) of this title; or (ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title [11 USCS § 330(a)];

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by-(A) a creditor that files a petition under section 303 of this title [11 USCS § 303];

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title [11 USCS § 1102], in making a substantial contribution in a case under chapter 9 or 11 of this title [11 USCS §§ 901 et seq, 1101 et seq.]; or

(E) a custodian superseded under section 543 of this title [11 USCS § 543], and compensation for the services of such custodian;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title [11

USCS §§ 101 et seq.], and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title [11 USCS §§ 901 et seq., 1101 et seq.], based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title [11 USCS §§ 101 et seq.]; [and]

(6) the fees and mileage payable under chapter 119 of title 28 [28 USCS §§ 1821 et seq.] [; and] [.] (Nov. 6, 1978, P.L. 95-598, Title I, § 101, 92 Stat. 2581; July 10, 1984, P.L. 98-353, Title III, Subtitle H, § 446, 98 Stat. 374.)

11 USC § 506(b)

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

28 USC § 1334(c)

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.].

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 [11 USCS §§ 101 et seq.] but not arising under title 11 [11 USCS §§ 101 et seq.] or arising in a case under title 11 [11 USCS §§ 101 et seq.], with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code [11 USCS § 362], as such section applies to an action affecting the property of the estate in bankruptcy.

28 USC § 1738

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be provided or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 USC § 157(c)

(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11 [11 USCS §§ 101 et seq.]. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected. (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 [11 USCS §§ 101 et seq.] to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title [28 USCS § 158].

STATEMENT OF THE CASE

Butler Machinery Co. (Butler) obtained a Judgment in North Dakota State District Court in 1985 against Haugen Construction Services, Inc. (HCSI) (Appendix page 26).

HCSI filed a petition in bankruptcy. When it developed that HCSI was unable to pay the State Court Judgment, Butler brought in the HCSI bankruptcy case an adversary alter ego action (related case – 28 USC 157(c)) against the sole stockholder of HCSI (Gary Haugen). The substance of the alter ego case was that the HCSI corporate form should be disregarded and Haugen made liable for the HCSI debts including Butler's Judgment obtained in the State District Court in 1985. After trial, the Bankruptcy Court issued a Report and Recommendation on July 11, 1989. It stated that Haugen should be held liable for HCSI's debts as of June 3, 1985 (the date of the debtor's bankruptcy petition) (Appendix page 29). The time for the determination of the extent and the validity of those debts in the bankruptcy case did not run until July of 1991 (two years after the Report and Recommendation of July 11, 1989). The report was adopted by the United States District Court (Appendix page 49). A Judgment was entered but without any money damages being asserted against Haugen (Appendix page 51).

Notwithstanding the lack of dollar damages (which Butler agreed was missing in the Bankruptcy Court alter ego Judgment), it executed on its newly acquired Bankruptcy Court alter ego Judgment by having the North Dakota State District Court issue a Writ of Execution in the 1985 State District Court case. It did this by having the alter ego Bankruptcy Court Judgment "blended" with the State Court Judgment. (Appendix pages 64, 69).

A Sheriff's execution sale was had in the North Dakota State HCSI case even though Haugen was not a judgment debtor in that action.

Haugen then personally filed in bankruptcy. He brought in the Bankruptcy Court an adversary action against Butler claiming excessive and wrongful execution. The Federal Court abstained sua sponte because the issues raised concerned primarily state law (Appendix page 53, 61). Haugen refiled his case in the State District Court.

The State District Court upon a Motion for Summary Judgment held that the two judgments, while separately valid, could not be tacked together for the purpose of determining what if anything Haugen owed Butler. The State Court struck down and vacated the execution (Appendix page 69). It stated that later proceedings in State Court would determine who would bear the execution costs (Appendix page 70).

Proceedings continued in the Bankruptcy Court to determine the validity and the extent of Butler's claim. The Bankruptcy Court concluded based in part upon the representations and statements of the parties, and the prior alter ego Judgment, that the adversary alter ego proceeding was not a hearing on the nature, amount, or validity of the claim, but rather was a proceeding that sought to make Haugen liable for the debts of HCSI (Appendix page 78). The Bankruptcy Court found that Haugen was only liable for the claims that were fixed and determined in the HCSI case. The Bankruptcy Court said Butler's claim did not take on new life by events of the later alter ego Judgment. All that Judgment did was render Haugen jointly and severally liable for a claim against HCSI as established in the HCSI bankruptcy case. The Bankruptcy Court concluded that no interest could run from and after the date of the filing in the HCSI

bankruptcy case since HCSI was a liquidating bankruptcy and Butler was undersecured in that case (Appendix page 84).

The Bankruptcy Court decision was appealed to the Federal District Court. On June 22, 1992, Federal District Court Judge Patrick Conmy, after having reviewed the extensive file and the tangled proceedings, adopted the rationale, logic, and reasoning of the Bankruptcy Court. Judge Conmy said "this entire mess" constituted one proceeding and that bankruptcy principles and common sense required a finding that the creditors of the HCSI case were not entitled to claim interest from and after the date of the first filing in bankruptcy, even though alter ego liability made another responsible for it (Appendix page 87).

Butler, being dissatisfied with this holding, appealed to the Eighth Circuit Court of Appeals. Haugen cross appealed.

COURT OF APPEALS RULING

The Court of Appeals noted that Butler was undersecured as to its claim in HCSI. No interest could run on that claim after the HCSI bankruptcy petition (Appendix page 9). The Court said that Butler's claim against Haugen personally arises from the Bankruptcy Court alter ego Judgment in the HCSI case (Appendix page 10) and that it cannot read the alter ego Judgment to render Haugen liable on the 1985 North Dakota State Court Judgment (a finding which is identical to the State Court decision) (Appendix page 69) or anything more than the

debts of HCSI existing on the date of its Bankruptcy Court filing (Appendix page 11). The Court of Appeals went on to state that the failure of the Bankruptcy Court to include interest on Butler's claim against Haugen from the date of the alter ego Judgment was erroneous (Appendix page 14). It directed the Bankruptcy Court to recalculate the amount Haugen owed after determining what Butler was paid. It asked the Bankruptcy Court to determine whether Butler was oversecured within the meaning of § 506(b) and whether Haugen is solvent. The Court of Appeals also said that the Bankruptcy Court must determine the amount of interest that flowed on the claim after Haugen's personal filing (if any), and determine what State Court execution costs Haugen was to bear (Appendix page 20). This was an adjudication of an issue previously decided by the State Court (Appendix page 70). The Court of Appeals went on to say that while Haugen was obligated to pay Butler's debt in the HCSI case, he was also responsible and equity dictated that Haugen should personally pay the HCSI Bankruptcy Court administration expenses (Appendix pages 23, 24). This amounted to a readjudication of damages that Haugen was found liable for on the 1989 alter ego suit (Appendix pages 47, 51-52). It also broadened the scope of 11 USC § 506 in conflict with previous Supreme Court decisions. Jurisdiction in the United States District Court from the Bankruptcy Court was based upon Bankruptcy Rule 8001 and 28 USC § 158. Jurisdiction on appeal at the Court of Appeals was by reason of 28 USC § 1291.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided several important issues of federal law which have not been but should be settled by this Court, or that it has decided a federal question in a way that conflicts with the applicable decisions of the United States Supreme Court.

The Court of Appeals has rendered a decision in conflict with the decisions of other United States Courts of Appeal on the same matter, or has departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Supreme Court, by granting certiorari, can establish a clear bright line dealing with:

A. Interrelationship of competing sovereigns. In this case, the State Court was directed to resolve a state law issue before the Bankruptcy Court under 28 USC § 157(c) and 28 USC § 1334(c). The State Court decided that issue. However, the Federal Appellate Court chose to ignore the State Court decision, while the Bankruptcy and Federal District Courts followed the State Court decision.

By permitting the Federal Appellate Court to redecide previously settled state law issues:

(1) Affects the ability of the State Court to properly act on cases and controversies before it.

(2) Results in multiplicity of suits, endless litigation, and proliferates forum shopping.

(3) Produces in the State Court a feeling of inferiority and affects in a significant way the

balance of power between the States and Federal Government.

(4) Denies litigants certainty and finality in litigation.

(5) Denies both litigants the benefits afforded to them by 28 USC § 1738.

(6) Creates uncertainty between the parties and courts as to which decision needs to be followed.

B. By granting the Petition for Certiorari, the Court can resolve the issue of whether interest abates on an indefinite, non-monetary bankruptcy court judgment consistent with the holding of *Kaiser Aluminum v. Bonjorno*, 497 US 827, 108 L Ed 2d 842, 110 S Ct 1570 (U.S. 1990), and when the underlying judgment lien has been nullified by separate and independent State Court action. The court can also settle the issue of whether a judgment can be made retroactively certain and bear interest under 11 USC § 506(b) after a filing in bankruptcy.

Resolution of this issue will facilitate an end to 11 USC § 506(b) litigation since it will define the rights of creditors on non-consentual liens that have been vacated and are indefinite in dollar damages and determine whether § 506(b) or § 502 is applicable in these cases. It will also define the scope of *Kaiser* and determine whether that ruling is applicable in bankruptcy proceedings, or is pre-empted in some manner by *Ron Pair*.

C. Granting Certiorari will resolve whether "Res judicata" and "Full Faith and Credit" are applicable in Bankruptcy Court (related case proceedings) or are preempted by the Federal Bankruptcy Act. Resolution of this

issue will adjudicate and settle the limits and effects of State Court decisions in Bankruptcy Court proceedings.

I.

Do the principles of "Full Faith and Credit" and "Res Judicata" prevent the Court of Appeals from deciding an issue that was previously decided by the North Dakota State Court under a Bankruptcy Court abstention order?

Congress enacted 28 USC, § 1334(c)(1) in response to *Thompson v. Magnolia Petroleum Co.*, 303 US 478, 84 L Ed 876, 60 S Ct 628 (U.S. 1940). The act deals with abstention in the interest of justice or in the interest of comity with state courts or respect for state law.

The Federal District Court abstained sua sponte from hearing issues dealing with Butler's execution in the North Dakota State District Court. The State Court decided the execution was wrongful. It vacated the writs and levies. The State Court held that a finder of fact in the State Court proceedings would determine who should bear responsibility for the collection and execution costs incurred by Butler. The Bankruptcy Court followed this decision and exercised its residual discretion in a judicious fashion. The United States District Court affirmed. However, the Court of Appeals ignored the State Court decision. It felt that Haugen should bear the costs of the Sheriff's sale. The Court of Appeals for no apparent reason chose to redecide an issue that was properly adjudicated by the State Court under an abstention order.

The Court of Appeals decision was not made by reason of precedent or statute, but upon its own notion of

equity. The Court of Appeals recognized that the issues before the Court involved an interpretation and construction of state law (Appendix page 18-20). It, however, decided the issues anew after the State Court ruled. The determination by the State Court is supreme on matters of state law and when that state law issue was properly before it. The Court of Appeals had no jurisdiction to redecide that matter. The Court of Appeals decision redeciding sua sponte the State Court decision between the same parties is at odds with what other circuits have said dealing with state law claims and abstention (*Re: White Motor Credit*, 761 F2d 270, CA 6th (Ohio 1985); *Pettibone Corp. v. Easley*, 935 F2d 121 (CA 7th 1991); *In Re Pan American Corp. v. Coker*, 950 F2d 839 (CA 2 1991), and Supreme Court decisions restricting the exercise of jurisdiction by Federal Courts over state law claims.

Were it to be asserted that principles of pendent jurisdiction give the Court power to decide this state law issue, *United Mine Workers v. Gibbs*, 383 US 715, 16 L Ed 2d 218, 86 S Ct 1130 (US 1966) holds a Federal Court should hesitate to decide state law claims. *Owen Equipment & Erection Co. v. Kroger*, 437 US 365, 57 L Ed 2d 274, 98 S Ct 2396 (US 1978), followed Gibbs. It held that the jurisdiction of Federal Courts is limited not only by the provisions of Article III of the Constitution, but also by Acts of Congress. Here a federal act (28 USC § 1334) dealt with abstention in favor of the State. The Bankruptcy and District Courts applied the same. The Appellate Panel ignored that unappealed abstention decision. It then redecided a previously resolved State Court issue. No basis in law or fact exists for that action.

If North Dakota by reason of an abstention order properly determined a "property" issue and matters incidental to them (*Barnhill v. Johnson*, 503 US ___, 118 L Ed 2d 39, 112 ___ S Ct ___, (U.S. 1993)), the Court of Appeals has crossed the boundary of permissible federal action.

28 USC § 1738 requires the Federal Court to give the judicial proceedings of the states "Full Faith and Credit". In *Parsons Steel v. First Alabama Bank*, 474 US 518, 88 L Ed 2d 877, 106 S Ct 768 (US 1985), this Court said that § 1738 requires the Federal Court to give "Full Faith and Credit" to the resolution of issues by the State Court, and not to apply their own rules of "Res Judicata" in determining the affect of a state judgment. Here the Court of Appeals was dissatisfied with the State Court ruling. It applied its own principles and understanding of equity on a purely state law matter. Nothing in the Bankruptcy Act permits this result.[2] See also, (*Massachusetts v. Sheppard*, 468 US 981, 82 L Ed 2d 737, 104 S Ct 3424 (US 1984)).

II.

Can interest flow on a judgment under 11 USC § 506(b) when that judgment did not conclusively establish the amount due, and when liability arose from a derivative proceeding where interest was stayed?

The Court of Appeals determined interest must flow on the alter ego Judgment. In order to arrive at this

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[2] Butler requested he State Court to delay entry of the State Court Judgment. The State Court agreed. Notwithstanding, § 1738's plain language prevents readjudication in the federal courts.

conclusion, it ignored *Kaiser Aluminum v. Bonjorno*, 497 US 827, 108 L Ed 2d 842 110 S Ct 1570 (US 1990). The Court of Appeals also ignored the parties' admissions and stipulations that the 1989 alter ego Judgment (Appendix page 15) was unable to be executed upon without blending it into the earlier State Court Judgment (Appendix page 69), (*Zobrest v. Catalina Foothills*, 509 US ___, 125 L Ed 2d 1, 9, 113 S Ct ___ (U.S. 1993), at footnote 8) and redecided the facts on a concluded, unappealed Judgment.

The State District Court under an abstention order determined that the 1989 federal alter ego Judgment and the 1985 North Dakota State Court Judgment could not be "blended" together for the purpose of determining liability and damages (Appendix page 69).

The Court of Appeals indicated 11 USC § 506(b) is the touchstone for determining whether interest runs on the unappealed indefinite alter ego Judgment. The Circuit ignored 28 USC § 1962, which mandates adherence to state law in determining whether a judgment acts as a "lien", and rewrote the alter ego Judgment of 1989 (Appendix page 51).

In North Dakota, in order to have a valid judgment lien and security within the meaning of 11 USC § 506, the judgment is required to be properly and completely docketed. Butler's alter ego Judgment has never been separately docketed in State Court. While its alter ego Judgment was previously "blended" with another judgment, that action was stricken by the State Court. NDCC, Section 28-20-13 notes a judgment in North Dakota becomes a lien as soon as it is docketed. *Aberle v. Merkel*, 291 NW 913, 916 (N.D. 1940). *Swanson v. Flynn*, 31 NW2d

320, 322 (N.D. 1948), recognizes the right to a judgment lien is purely statutory and requires setting forth the number of judgment book and page of entry as a positive act. The North Dakota Supreme Court in *CIT Group/ Equipment Fin. v. Travelers Ins.*, 504 NW2d 565 (N.D. 1993), upheld the necessity of docketing federal judgments in order that they be given the status of a lien. *Hamilton Steel Products, Inc. v. York*, 376 F2d 463 (CA 7th Ill 1967) holds that in order for a federal judgment to be a lien, it needs to be recorded in the proper office of the state (construing 28 USC § 1962). *United States v. Kendall*, 26 Fed 126 (DC LA 1920). The Court of Appeals seemingly eliminated the State Court ruling and the necessity of docketing judgments. It implies that the mere existence of an indefinite judgment without more confers lien and security status. This is contrary to the settled rule in North Dakota and other circuits. The Court of Appeals ignored the fact that there was no judgment filed with the State Court except the vacated "blended" Judgment. It incorrectly applied § 506(b) and misconstrued the holdings of prior Supreme Court decisions on § 506. *United States v. Ron Pair Enterprises*, 489 US 235, 103 L Ed 2d 290, 297, 109 S Ct 1026 (U.S. ___); *United Savings Association of Texas v. Timbers of Inwood Forest*, 484 US 365, 98 L Ed 2d 740, 108 S Ct 626 (U.S. ___); *Rake v. Wade*, 508 US ___, 124 L Ed 2d 424, 113 S Ct ___, (U.S. 1993), mandate the award of interest but only after there had been a determination that a valid secured claim exists. It having been determined by the State Court that the "blending" was void and the Judgment lien purged, 11 USC § 502(b)(2) is the applicable statute to be applied.

The underlying Bankruptcy Court correctly decided the question of interest when it said that the alter ego Judgment did not conclusively establish the amount of the claim because the nature of that action was not an objection to the claim under § 502(b), nor had the time yet run for the trustee to raise an objection. In addition, the Judgment ignored *all* measure of damages. The Bankruptcy Court considered the pleadings, along with the proof which was silent on the matter of damages. Even the Report and Recommendation that the Circuit relies upon only indicates that Butler's claim is evidence of debt (Bankruptcy Rule 3001(f)). The time for objections on the debts in the HCSI case had not run on the date the alter ego Judgment was entered. Hence, Butler's debt was unmatured and could not run with interest. Butler acknowledges in the execution proceedings that it needs more than the alter ego Judgment in order to proceed with enforcement activity. It recognized this because the Judgment did not at any time set forth dollar damages that Haugen was obligated on. *Kaiser Aluminum v. Bonjorno*, 497 US 827, 108 LE2d 842, 110 S Ct 1570 (US 1990), recognizes interest accrues only when the judgment is legally sufficient. Here the alter ego Judgment was not legally sufficient in order for any interest to run under § 506(b) and for the reasons set forth in the Bankruptcy Court's decision. As noted above, when the judgment lien fell in the "blending" action, no collateral existed that permitted interest to accrue under § 506(b). This separate reason defeats entitlement to interest under § 506.

III.

Can the Court of Appeals alter liability and damages on a collateral unappealed judgment that became final years ago and now obligate the judgment debtor to pay the separate and unrelated bankruptcy costs of a third party?

The Court of Appeals altered the unappealed alter ego Judgment of 1989. In addition to making Haugen liable in a dollar certain amount, it imposed additionally upon Haugen "administrative costs" of the HCSI bankruptcy (Appendix page 23). Nothing in the alter ego Judgment assessed Haugen with the HCSI "administration costs" or authorized any court to impose on Haugen enhanced damages beyond zero dollars later. In *Cal. Equalization Bd. v. Sierra Summit*, 490 US 844, 104 L Ed 2d 910, 109 S Ct 2228 (1989), Justice Blackmun, in a concurring opinion, said:

> . . . That final judgment, and the legal precedents underlying it, are not now subject to collateral attack in these contempt proceedings. This Court in Federated Department Stores, Inc. v. Moitie, 452 US 394, 69 L Ed 2d 103, 101 S Ct 2424 (1981), wrote:
>
> "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action . . . Nor are the res judicata consequences of a final, unappealed judgment on the judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." . . .

(See also, *Maggio v. Zeitz*, 333 US 56, 92 L Ed 2d 476, 68 S Ct 401 (US 1948).)

By assessing Haugen with "administrative costs" of the HCSI case when the alter ego Judgment was silent as to them and all other dollar damages denied Haugen of his right to rely upon the preclusive and final effect of the earlier unappealed judgment. Haugen now will suffer a significant financial detriment not known to him years ago when he made the decision not to challenge the alter ego Judgment. He cannot now appeal that earlier alter ego Judgment even though the Circuit has placed on him enhanced and altered liability and questioned whether the cause of action in that matter was previously barred. This gives a hollow ring to the phrase "due process and equal protection". Butler has been afforded the benefits of the earlier Judgment and given enhanced rights by the Eighth Circuit's modification of it. The only justification of the Circuit for the change is "equity" – a concept that varies depending upon who advocates it.

This Court in *Rake v. Wade*, 508 US ___, 124 L Ed 2d 424, 113 S Ct ___, (U.S. 1993), said that a statute such as § 503 must be read as drafted and should be conclusive. Nothing in § 503 authorizes administration expenses of a bankrupt to be assessed against a third party. The Court of Appeals action not only affected a concluded case, but has altered the Bankruptcy Act itself, and changed the debtor's liability in a concluded bankruptcy case.

The practical effect of the Eighth Circuit's decision is that Haugen's obligation on the alter ego judgment is subject to relitigation while the issue of liability remains set in stone. For example, the Eighth Circuit said credit is

to be given only for what Butler has received. In reality, Butler "received" everything from the execution proceedings since its alter ego Judgment was a "related case" brought for its own benefit (Appendix page 41). The recovery in that "related" proceeding was not property of the HCSI estate under 11 USC § 541 since it was property of a third party (Haugen). As such, the recovery was exclusively Butler's. The Court of Appeals decision transferred the earlier case by the stroke of a pen into a "core proceeding". This transformation was completed under equity and potentially obligates Haugen to pay a greater sum than the Judgment infers. One wonders why this four year old decision is selectively modifiable. Considering the fact that proceeds of the execution sale were diverted by third parties to pay the trustee, attorney fees, taxes and other administrative expenses which were not earlier Haugen's measure of responsibility forces him to overpay. The Circuit's reliance upon Restatements of Judgments 2d, § 50(2) is incorrect. That section deals with multiple judgment debtors prohibiting Haugen from paying a judgment undiminished by earlier receipts (*HGN Corporation v. Chamerlain, et al*, 642 FSupp 1443, 1451 (ND Ill 1986); *Tuchalski v. Moczynski*, 449 NW2d 292, 293 (Wis App 1989); *Amalgamated v. Compolong*, 463 A2d 1129, 1130 (Penn 1983); *Medearis v. Miller*, 306 NW2d 200, 202 (N.D. 1989)).

The Circuit recognizes Haugen and his alter ego contributed more than $700,000.00 as the result of the alter ego judgment. Haugen's responsibility at best under the alter ego decision was $821,159.00 and no more. The fact that a third party diverted funds to others is of no concern to Haugen since his liability and responsibility went

to paying only that obligation as ordered initially by the alter ego Court. 33 CJS, Executions, § 337, notes satisfaction occurs to the extent of the proceeds of the sale. Had Butler wished Haugen's liability to be greater, the alter ego case should have been pled and proved to require Haugen to pay the HCSI administration costs and damages. Changing the liability and damages is now prohibited by res judicata. *Federated Department Stores, Inc. v. Moitie*, 452 US 394, 69 L Ed 2d 103, 101 S Ct 2424 (U.S. 1981).

CONCLUSION

This judicial puzzle has burdened society. *Pennzoil v. Texaco*, 481 US 1, 95 L Ed 2d 1, 107 S Ct 159 (U.S. 1987), held that the lower federal court should have abstained under the principles of federalism. The Court went on to note the significant interests harmed by unprecedented intrusions into the Texas judicial system.

Not only did the Court of Appeals intrude into a previously decided State Court matter properly before that State Court, but it redecided those issues, ignored federal statutes in the process, and changed a citizen's measure of liability and damage by the stroke of a pen.

If our nation is composed of 50 sovereigns, then they should be given the right to act and be sovereigns.

As this decision now stands, North Dakota is cast into an inferior role. The finality of a concluded Judgment was violated. Surely our founding fathers expected more. So do the people of the 50 states. North Dakota decisions

and a concluded Judgment need to be given respect. This Circuit decision is contrary to established principles of jurisprudence and constitutional law and needs to be vacated.

WHEREFORE, Gary Haugen, et al, Petitioner, prays that a writ of certiorari be granted.

Dated this 2nd day of December, 1993.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 92-2581/2632

In re: Gary Haugen Debtor.	*	
Butler Machinery, Inc., on behalf of itself and all other similarly situated, Appellant/Cross-Appellee, v. Gary Haugen, doing business as Haugen Construction Service, doing business as Property Investors, doing business as Haugen Farms, individually; Minot Sand & Gravel, Inc., a North Dakota corporation; Haugen Development, a North Dakota corporation; XYZ Corporation, a corporation or corporations whose true identity is presently unknown to plaintiff, Appellees/Cross-Appellants.	*	Appeal and Cross-Appeal from the United States District Court for the District of North Dakota.

Submitted: March 18, 1993

Filed: July 22, 1993

Before FAGG, MAGILL, and HANSEN, Circuit Judges.

MAGILL, Circuit Judge.

Butler Machinery appeals from the bankruptcy court's order fixing the amount of its claim in Gary Haugen's personal bankruptcy. Gary Haugen[1] cross-appeals from the bankruptcy court's denial of his motion for turnover of property. We affirm in part, reverse in part, and remand.

I. BACKGROUND

The appellant, Butler Machinery, Inc. (Butler), is in the business of selling and leasing heavy machinery, such as crawler tractors and scrapers. During the early 1980s, appellee Gary Haugen was engaged in earth moving (road construction, etc.) for companies engaged in oil exploration and drilling, among other customers. Prior to 1985, Haugen Construction Services, Incorporated (HCSI), a corporation wholly owned by Haugen, entered into several heavy equipment lease agreements with Butler.

The leases went into default, and Butler sued HCSI for breach of contract. On February 13, 1985, judgment was entered in Ward County (North Dakota) court in favor of Butler and against HCSI, in the amount of $738,587.88. *Butler Mach. Co. v. Haugen Constr., Inc.*, Civil

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[1] Gary Haugen died during the pendency of the bankruptcy proceedings, and the bankruptcy proceedings are carried on by his administrators. For ease of communication, we will refer to Haugen as the real party in interest.

No. 51149, J. of Ward County Dist. Ct. (Feb. 13, 1985) (Jt. App. at 245) (Ward County judgment).

On June 3, 1985, HCSI filed for Chapter 11 bankruptcy (later converted into Chapter 7 after reorganization efforts failed). Butler filed its proof of claim in the amount of $821,159, representing the Ward County judgment with accrued interest until the date of HCSI's bankruptcy filing. This claim was not objected to and was allowed by the HCSI bankruptcy trustee.

In 1988, Butler, for itself and other members of the class of unsecured creditors of HCSI, commenced in the HCSI bankruptcy an adversary proceeding against Haugen personally, seeking a determination that HCSI was merely the alter ego of Haugen, and that Haugen was personally liable for HCSI's debts, including the Ward County judgment. On July 11, 1989, the bankruptcy court issued its report and recommendation, finding that Haugen individually, HCSI, and Minot Sand & Gravel (another of Haugen's corporations) represented one commercial enterprise, and that the two corporations were merely Haugen's alter egos. That report and recommendation was adopted in full by the district court, and judgment was entered accordingly. *In re Haugen Constr. Servs., Inc.*, 104 B.R. 1013 (D.N.D. 1989) (alter ego judgment).

The federal alter ego judgment was docketed in Ward County District Court on December 26, 1989, pursuant to the North Dakota Uniform Enforcement of Foreign Judgments Act, N.D. Cent. Code § 28-20.1 (1991).

Butler subsequently executed on this judgment. Pursuant to this execution, the Ward County sheriff seized a

massive amount of Haugen's personal property, ranging from hand tools to heavy machinery, pigs to llamas, to satisfy the alter ego judgment. This property had to be transported prior to sale, at substantial cost. In addition, an auctioneer was retained to handle the sale. The sheriff's sale was held over a two-day period in March 1990, and realized gross proceeds of $586,870.88. After subtracting $84,769.76 in statutory fees and costs of sale, the sheriff delivered the net proceeds of $502,641.12 to Butler as judgment creditor.

The trustee in the HCSI bankruptcy moved for an order directing Butler to turn over those proceeds to the bankruptcy trustee. That motion was granted, and Butler turned over the proceeds as ordered.

Meanwhile, on April 13, 1990, Haugen individually filed a petition for relief under Chapter 11.

During the course of these events, Minot Sand & Gravel, another corporation found to be Haugen's alter ego, sued on a large account receivable owed it by Santa Fe Engineers. On June 21, 1990, Butler filed an involuntary Chapter 7 bankruptcy petition against Minot Sand. Thereafter, Minot Sand settled its litigation with Santa Fe in a net amount of $131,589.34. HCSI's trustee moved for turnover of that amount on the ground that Minot Sand was HCSI's alter ego, and the settlement proceeds were turned over to the HCSI bankruptcy estate on August 23, 1990. *In re Haugen Constr. Servs., Inc.*, No. 85-05321, Order (Bankr. D.N.D. Aug. 22, 1990) (Jt. App. at 238).

The HCSI bankruptcy trustee used the proceeds from the execution sale and the Minot Sand bankruptcy to pay

various administrative expenses, including trustee's commission, and to make distributions to creditors in partial payment of claims. The trustee distributed $294,193.08 to Butler and Westlie Motor Co., of which $246,717.23 went to Butler and the balance to Westlie. The trustee then filed his final account (Jt. App. at 248), which was approved by the bankruptcy court.

In August 1990, Haugen brought an adversary action against Butler in his Chapter 11 case. In that complaint, he alleged that Butler could not docket the bankruptcy court alter ego judgment in state court, the North Dakota Enforcement of Foreign Judgments Act was unconstitutional, and he had been denied due process and equal protection of the laws. Haugen also alleged that Butler was guilty of abuse of process and had tortiously executed upon property worth more than the amount to which Butler was entitled.

On September 24, 1990, the bankruptcy court entered an order concluding that Haugen's claims were state law claims, and that the bankruptcy court should abstain in favor of state jurisdiction. The district court affirmed that decision by order filed October 18, 1990. *See Haugen v. Butler Mach., Inc.*, No. 90-7059, Order (Bankr. D.N.D. Oct. 18, 1990) (Jt. App. at 45).

Haugen then filed a complaint in Ward County District Court, raising the same claims raised in his adversary action. On cross- motions for summary judgment, the state district court determined that Haugen's constitutional claims were without merit. It further determined, however, that it was not possible to determine, from the

1985 Ward County judgment and the 1989 alter ego judgment, how much Haugen personally owed Butler. The court thus concluded, in its memorandum opinion, that the execution should not have issued on the alter ego judgment, and that all further action to collect on the alter ego judgment should be stayed. The state district court did not, however, enter an order to this effect, but rather stayed its hand in favor of the bankruptcy proceedings. *Haugen v. Butler Mach., Inc.*, Civil No. 90-1147, Mem. Op. at 8 (N.D. Aug. 8, 1991) (Jt. App. at 83).

To date the state district court has not issued a final order. On October 22, 1991, the district court indicated by letter that it would do nothing prior to the bankruptcy court's disposition of the motions set for hearing on November 13, 1991 (the disposition of which is presently appealed).

While all these events transpired, Butler filed its proof of claim in Haugen's individual bankruptcy. That claim, as amended January 15, 1991, was in the amount of $1,835,264.93, which included a claim by Westlie for $423,555.[2] Haugen objected to Butler's claim, and sought to have it dismissed.

On November 4, 1991, the bankruptcy court heard cross-motions by the parties in Haugen's individual Chapter 11 case. Haugen moved for dismissal of Butler's claim and requested the bankruptcy court to order turnover to Haugen (as debtor in possession) all the funds

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[2] Westlie's claim was included in Butler's because Butler was acting as the representative of the class of creditors for whom Butler had successfully litigated the alter ego action.

Butler received as proceeds of the sheriff's sale in March 1990 (even though those funds had been turned over to the HCSI trustee and distributed).

Butler also moved the bankruptcy court in the HCSI bankruptcy for an order concluding the adversary class action and determining the amount Haugen owed Butler. It also moved for a determination of the amount of its claim in Haugen's personal bankruptcy. This issue required the district court to determine whether interest continued to accrue on the ward County judgment after the date HCSI filed bankruptcy, and what amount should be credited to Haugen against that debt for funds paid to the HCSI bankruptcy trustee. That question, in turn, required determination of who would bear the costs of the sheriff's sale, Butler or Haugen.

The bankruptcy court issued its order on November 13, 1991. It concluded that there was no need to enter an order concluding the class action in the HCSI bankruptcy, as its prior order was clear as to the amount that Haugen owed Butler. In the Haugen individual bankruptcy, the court denied Haugen's motion to dismiss Butler's claim and for turnover, and treated the issue as one to determine the amount of Butler's claim. The court held that Haugen's alter ego liability was derivative of HCSI's liability, and thus Haugen could owe no more than did HCSI. Because Butler was HCSI's creditor, and was undersecured in HCSI's bankruptcy, the court held that interest on the judgment stopped as of the filing date of HCSI's bankruptcy. The court further held that none of the proceeds of the sheriff's sale could be used to pay the costs of the execution sale of Haugen's personal property (i.e., Butler bore those costs). Finally, the court reduced

Butler's claim in the Haugen personal bankruptcy by 100% of the gross proceeds from the sheriff's sale and the Santa Fe settlement, even though a significant portion of those proceeds went to pay administrative expenses and other claims.

II. DISCUSSION

As complex and convoluted as this case may seem, the main issue on appeal is in reality quite straightforward: how much does Gary Haugen owe Butler Machinery? The answer to that question should determine the amount of Butler's claim in Haugen's individual bankruptcy. To reach that answer we must examine and answer four sub-questions: (1) what is Haugen's initial obligation to Butler; (2) does that obligation bear interest; (3) who must bear the cost of the execution sale of Haugen's property; and (4) to what extent should Haugen's debt to Butler be reduced by funds that either Haugen or Minot Sand paid into the HCSI bankruptcy? We consider these issues in turn.

A. Calculation of Haugen's Initial Obligation to Butler

Butler argues that the district court erred in refusing to value Butler's claim in the Gary Haugen personal bankruptcy as the amount of the initial Ward County judgment against HCSI plus interest from the date the Ward County judgment was rendered to the date of Gary Haugen's personal bankruptcy filing. Butler also contends that its claim in the Gary Haugen personal bankruptcy should include post-petition interest should Butler

prove to be oversecured or should Haugen prove to be solvent. We disagree.

In computing the amount of Butler's individual claim against Haugen, the bankruptcy court noted that the alter ego judgment initially held Haugen liable only for Butler's bankruptcy claim against HCSI, namely the debts of HCSI on the date of its bankruptcy petition. Because Butler was undersecured as to its claim against HCSI, no interest ran against that claim after the date of HCSI's bankruptcy petition. The court stated:

> Butler argues, however, that because Gary was held to be liable for all of Haugen Construction's debts that there has been a form of claim amalgamation with the claim against Haugen Construction becoming a claim against Gary, unfettered by the event of Haugen Construction's own bankruptcy filing or its own limited assets – assets which taken alone, would leave Butler undersecured but which, when buttressed by Gary's own considerable assets, leave it oversecured and thus amenable to continuing interest. The court disagrees with Butler's view. Butler's claim against Haugen Construction, a claim for which Gary was later held responsible, was determined and fixed in the Haugen Construction case. It did not take on new life by the events of the later alter ego judgment. All that judgment did was to render Gary and Minot Sand and Gravel jointly and severally liable for the claim against Haugen Construction – *as established in that case.* This means it carries no interest from and after the date of Haugen Construction's filing. The claim was fixed at $821,159.00 as set forth in the proof of claim – an amount which was never objected to in the

> Haugen Construction case and an amount which was recognized and allowed by the Chapter 7 trustee.

In re Haugen, No. 90-05296, Order at 4-5 (Bankr. D.N.D. Nov. 13, 1991).

Butler contends that the district court's alter ego judgment, rendered more than four years after the Ward County judgment, effectively made the Ward County judgment a judgment against Haugen from the date of its rendering. Butler contends that the bankruptcy court's holding that Haugen was HCSI's alter ego *mandates* a holding that Haugen was liable on the Ward County judgment from the date of its rendering. Butler states:

> The result is that the judgment which was accruing interest was not just against HCSI, but was against Haugen as well. When HCSI – merely a sham corporation for Haugen's convenience – filed bankruptcy, the running of interest may have stopped as to HCSI, but the interest on Haugen's separate and independent liability continued. The corporate form cannot be given effect to stop Haugen's interest, while it is disregarded for all other purposes.

Br. of Appellant at 25.

We disagree. The only basis for Butler's claim against Haugen personally comes from the alter ego judgment in the HCSI bankruptcy. Without that judgment, Haugen could rely on the corporate form and Butler would be entitled only to what it would receive in the HCSI bankruptcy. Thus, Butler's claim against Haugen individually depends upon the effect of the alter ego judgment.

We cannot read the alter ego judgment to render Haugen liable on the Ward County judgment, or for anything more than the debts of HCSI existing on the date of HCSI's bankruptcy petition. The bankruptcy court's report and recommendation, upon which the district court entered judgment, provided that:

> Accordingly, for the reasons stated, it is recommended that Gary Haugen personally and Minot Sand and Gravel, Inc. are *jointly and severally liable for all of the debts of Haugen Construction Services, Inc. as of June 3, 1985, (the date of the Debtor's [HCSI's] bankruptcy petition) including the following:*
>
> Acme Electric $1,730.00; Anderson Reports $60.00; Bearing & Drives $7,724.96, Butler Machinery 821,159.00 (arising from judgment obtained in Civil No. 51149 entered in Ward County District Court); Krebsbach, Inc. $422.64; Midwest Industrial $1,425.08; Midwest Industrial $10,020.15; Northwest Equipment $707.55; Northwest Sheet & Iron Works 543.78; Rued Insurance $10,000; Sweeney Bros. $3,766.93; Wibe Electronics $314.12.
>
> LET JUDGMENT BE ENTERED ACCORDINGLY.

Butler Mach., Inc. v. Haugen (In re Haugen Constr. Servs., Inc.), No. 88-7083, Report and Recommendation at 18-19 (Bankr. D.N.D. July 11, 1989) (Jt. App. at 3). The district court entered judgment based upon this report and recommendation on September 15, 1989.

Thus, the district court's alter ego judgment clearly held Haugen liable to Butler not for the Ward County

judgment but for a sum certain, $821,159, which represented HCSI's debt to Butler on the date of HCSI's bankruptcy filing.[3] Moreover, the judgment does not purport to make Haugen a judgment debtor on the Ward County judgment against HCSI, and says nothing about either retrospective effect or prejudgment interest. Although the alter ego judgment clearly did not give Butler what it

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[3] Haugen challenges the alter ego judgment on the ground that he was not given the opportunity to challenge the underlying breach of contract judgment against HCSI. That contention is meritless for two reasons. First, like Butler, Haugen failed to take a timely appeal. Second, even if Haugen had appealed, we would conclude that he could not now contest the results of the action against HCSI, as he controlled the litigation. *See Stetson v. Investors Oil, Inc.*, 176 N.W.2d 643, 651-52 (N.D. 1970) ("The rule . . . is that a judgment recovered in an action is res judicata or conclusive, as to the issues adjudicated therein, in favor of or against a person who, though not an actual party to the record in that action, prosecuted the action or the defense thereto, on behalf of a party . . . if the same issue should be raised again in a subsequent action between him and the adversary of the party to whom his assistance was given or with whom he co-operated."). Here, Haugen not only prosecuted the action against Butler on behalf of HCSI, but he also was a party to the action as a guarantor, and thus had a personal stake in the outcome of HCSI's liability to Butler. Therefore, Haugen is bound by the results of the original state court breach of contract action between HCSI and Butler.

Haugen also contends, and the state district court believed, that Butler could not "blend" the alter ego judgment with the Ward County judgment against HCSI to support a valid execution by Butler against Haugen. We believe this reasoning is incorrect. As noted above, Haugen cannot challenge the Ward County judgment against HCSI. Given that, the district court's alter ego judgment stands on its own as a valid judgment against Haugen, and does not need to be "blended" with an earlier judgment to constitute a valid judgment against Haugen.

now claims it wants, Butler did not appeal at the time the adversary judgment was rendered. If in fact that judgment was a final, appealable judgment, Butler's failure to appeal means that we may not review the district court's decision to render judgment only for the debts of HCSI owing on the date of HCSI's bankruptcy petition.

The failure to appeal an order in bankruptcy will cause a forfeit of later review if two conditions occur: (1) the order is final under the standard of 28 U.S.C. § 1291, and (2) the judgment is set forth in a separate document as provided in Bankruptcy Rule 9021(a).[4] *See Matter of Kilgus*, 811 F.2d 1112, 1116-17 (7th Cir. 1987). Both requirements are met in this case. Had the alter ego action been brought outside of bankruptcy, the judgment finding Haugen jointly and severally liable for the debts of HCSI on the date of petition would be a final order. Moreover, the judgment was entered on a separate document. *See Butler Mach., Inc. v. Haugen (In re Haugen Constr. Servs., Inc.*, No. 88-7083, Judgment (Bankr. D.N.D. Sept. 15, 1989) (Jt. App. at 23). The judgment thus became final and appealable on September 15, 1989, the date the district court entered judgment in Butler's favor. Because Butler failed to appeal from the adversary judgment, we believe it must be bound by that judgment's plain terms, which make Haugen liable only for those debts of HCSI existing on the date of HCSI's bankruptcy petition.[5]

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[4] Bankruptcy Rule 9021(a) provides, in pertinent part, that: "Every judgment entered in an adversary proceeding or contested matter must be set forth on a separate document."

[5] We recognize the potential inequity in concluding that Haugen is not liable for interest during much of the time that his

Thus, we conclude that Haugen's initial liability to Butler, for purposes of calculating Butler's bankruptcy claim, is the alter ego judgment in the amount of $821,159.

B. Calculation of Interest on Haugen's Obligation to Butler

We disagree with the bankruptcy court, however, to the extent that it failed to include in Butler's claim interest accruing upon the alter ego judgment against Haugen from the date of entry of that judgment to the date of Haugen's individual bankruptcy petition. Moreover, we

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actions caused Butler to be without the use of its money. This inequity is tempered, however, by our belief that there is a serious question about whether Butler should have been allowed to bring the alter ego action at all. When Butler filed the alter ego action, Haugen claimed that the action was barred by res judicata, as Haugen had been joined as a guarantor in Butler's initial action against HCSI. The bankruptcy court concluded that Butler's action was not barred, holding that in the state court action "the state court only determined that Haugen had no liability for the Debtors' debts as the result of a guarantee. The issue of whether the corporate veil should be pierced is a separate claim which was not presented to the state court and is not barred in the instant action by the doctrine of res judicata." *Butler Mach., Inc.*, No. 88-7083, Report and Recommendation at 13. Haugen did not appeal this ruling. Had he done so, we believe that the court should have found Butler's alter ego action barred by res judicata. *See, e.g., Bates Mktg. Assocs., Inc. v. Lloyd's Elecs., Inc.*, 464 A.2d 1142, 1144 (N.J. 1983) (failure to raise alter ego claim against parties to first action bars litigation of that alter ego claim against those parties in a subsequent action). We recognize that there is nothing we can do legally; however, in the balance of the equities, this seems to even things out.

conclude that the bankruptcy court must examine whether interest continues to run on that debt after Haugen's bankruptcy petition either because (a) Butler is oversecured within the meaning of § 506(b) of the Bankruptcy Code, or (b) Haugen is solvent.

The bankruptcy court and the district court appeared to treat Haugen's liability to Butler as if Haugen was liable only for those debts of HCSI left unsatisfied at the close of HCSI's bankruptcy. We believe that this analysis was incorrect. The district court's alter ego judgment made Haugen personally a judgment debtor with respect to Butler; this judgment, less any satisfaction in the HCSI bankruptcy, is the source of Haugen's liability to Butler. Thus, whether Butler is entitled to interest from Haugen depends on whether interest can accrue on the judgment against Haugen individually.

Under federal law, "interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1291 (1988). Because a bankruptcy court is part of the district court, this statute applies to bankruptcy proceedings. *See In re Pester Ref. Co.*, 964 F.2d 842 (8th Cir. 1992). The interest rate to be allowed is a question of federal law. As the district court's alter ego judgment against Haugen is for money damages, it constitutes a money judgment that potentially can bear interest.

The question remains whether the alter ego judgment against Haugen was definite enough to bear interest. Haugen claims that it is not, as the judgment did not state a "bottom line" amount for which he is liable. We disagree. At least with respect to the amounts specifically set

out in the bankruptcy court's report and recommendation, which the district court accepted, the judgment was certainly definite: the district court held Haugen liable for those amounts. *See supra* at 9. Thus, interest can accrue on those amounts.

Finally, we see no contradiction between concluding that interest does not run on Butler's claim against HCSI, and concluding that it does run on Haugen's judgment liability to Butler. We have been provided with no basis for concluding that one joint judgment debtor may not continue to be liable for interest simply because another joint debtor is in bankruptcy. We conclude that interest can accrue on the $821,159 which the district court concluded Haugen owed Butler.

Thus, on remand: (1) the bankruptcy court must include in Butler's claim in Gary Haugen's individual bankruptcy interest computed on the outstanding balance of the alter ego judgment against Gary Haugen from the date of the district court's entry of judgment in the alter ego class action until the date of Haugen's personal bankruptcy filing; and (2) the bankruptcy court must determine whether interest continues to accrue post-petition on this obligation.

C. Costs of the Execution Sale

Butler claims that the bankruptcy court erred by reducing its claim against Gary Haugen by the entire amount realized at the execution sale of Haugen's personal assets, effectively charging Butler with the costs of that sale.

To satisfy Haugen's debt upon Butler's state court writ of execution, the sheriff sold a massive amount of Haugen's personal property. The amount of property involved required the sheriff to take extraordinary steps in conducting the sale. For example, the sheriff had to hire a company to move Haugen's heavy equipment to the place of sale, as the county was neither equipped nor insured to do so. The county had to arrange for storage of property until the date of sale. The sheriff further had to arrange for the care and feeding of exotic animals, including llamas, goats, and pigs, owned by Haugen, until the date of sale. Finally, because the sale involved so much property, the sheriff, believing that an auctioneer was necessary to bring the best price for the property, hired an auctioneer and paid him a five percent commission. *Butler Mach., Inc. v. Haugen (In re Haugen Constr. Servs., Inc.)*, No. 887083, Aff. of Kenneth Alexander (Bankr. D.N.D. Oct. 2, 1991) (Jt. App. at 91).

Butler claims that Haugen should be responsible for the costs of sale. Butler acknowledges that the North Dakota statute concerning execution sales is silent on these costs, while other North Dakota statutes (the Uniform Commercial Code and the statute concerning mortgage foreclosure sales) allocate the costs of sale to the debtor. Butler contends, however, that the rule allocating costs of such sales to the debtor is so universal that failure to include it in the execution statute was a mere oversight.

Haugen claims that it should not be liable for the costs of sale. He claims that the North Dakota execution statute's silence on the issue of costs means that the district court has discretion to allocate these costs, and

that the district court exercised that discretion by allocating the costs to Butler. Haugen further contends that although there is no North Dakota law on point, the general rule is that a sheriff may not hire an auctioneer to conduct an execution sale and charge the costs to the debtor without the debtor's consent.

Unfortunately, neither party has provided us with any North Dakota case law on this issue, and we have been unable to find any. We conclude, however, that Haugen should bear the costs of the sale.

Chapter 28-21-06 of the North Dakota Century Code, concerning execution sales, provides in pertinent part that the sheriff shall:

> 1. If the execution is against the property of the judgment debtor, satisfy the judgment with interest and accruing costs, *which include sheriff and county costs,* out of the personal property of the debtor, and, if sufficient personal property cannot be found, out of the real property belonging to the debtor on the day when the judgment was docketed in the county or at any time thereafter.

N.D. Cent. Code § 28-21-06 (1991) (emphasis added). Neither the North Dakota statutes nor North Dakota case law define the term "sheriff and county costs." Several factors, however, lead us to construe that term to include all reasonable costs of sale.

First, as a general rule "the proceeds of an execution sale are subject to the payment of legal costs and official expenses which were incurred to effect the execution sale, and . . . priority should be given to such costs and expenses in the distribution of the proceeds." 30 Am. Jur.

2d Executions § 520, at 743; *accord* 33 C.J.S. Executions § 244, at 508. Second, North Dakota statutes require the sheriff to take at least some of the actions taken in connection with this sale. North Dakota Century Code § 28-23-07 requires that if the sheriff sells "personal property capable of manual delivery, [the sale] must be within view of those who attend the sale and must be sold in such parcels as are likely to bring the highest price. . . ." This provision appears to require the sheriff to marshal the personal property in one place for sale. For these reasons, we construe the term "sheriff and county costs" to include all the costs of sale except the auctioneer's fee.

The auctioneer's fee stands on a slightly different footing. As Haugen notes, the common law rule was that the sheriff generally could not hire an auctioneer to conduct an execution sale and charge those costs to the debtor. *See* 30 Am. Jur. 2d Executions § 305, at 624; 33 C.J.S. Executions § 201, at 438. No North Dakota statute specifically authorizes the hiring of an auctioneer to conduct the sale. However, on the unique facts of this case, we conclude that the hiring of an auctioneer constitutes "sheriff or county costs" that can be paid from the proceeds of the execution sale prior to application of the proceeds to the satisfaction of Haugen's liability.

Under North Dakota law, the property at an execution sale must be sold "in such parcels as are likely to bring the highest price." N.D. Cent. Code § 28-23-07 (1991); *Lang v. Berrios*, 472 N.W.2d 464, 466 (N.D. 1991). If the sheriff fails to fulfill this statutory duty, he may be liable for wrongful execution. *Lang*, 472 N.W.2d at 465.

The sheriff in this case considered his statutory duty and determined that it could best be fulfilled by hiring an auctioneer. He stated:

> [D]ue to the large amount of personal property to be included in the sheriff's sale and the value of such property, it was clear to me that a sale conducted by me or any other deputy would not bring the best price for the property. Based upon my experience and observations, it was and is my opinion that only a professional auctioneer could properly organize, advertise and conduct a sale of this size in a manner that would obtain the highest price available for the goods. . . . The sale of this property was, indeed, very successful and I believe that [the auctioneer's] efforts were well worth the 5% commission paid to him.

Aff. of Kenneth Alexander (Jt. App. at 92, 94-95). In light of the enormous amount of property involved in this sale, we view the sheriff's actions as reasonable steps taken to fulfill his statutory duty to maximize the proceeds of the sale. Without addressing anything beyond the unique facts of this case, we conclude that the sheriff's decision to hire an auctioneer was a reasonable one. Thus, such costs should be included in the sheriff's costs payable from the proceeds of the execution sale.

We thus hold that the district court erred in reducing Butler's claim against Gary Haugen by the costs of the execution sale. On remand the court must exclude these costs when computing the amount Haugen has contributed toward the satisfaction of his debt to Butler.

D. Distribution of the Proceeds and Calculation of Butler's Claim in Haugen's Personal Bankruptcy

Butler contends that the district court erred in determining the amount of its claim against Haugen by crediting against its claim all amounts received from the execution sale of Haugen's personal property and from Minot Sand's involuntary bankruptcy, even though some of these proceeds were used to pay creditors other than Haugen and to pay administrative expenses of the HCSI bankruptcy.

Again, as we noted above, it appears that the district court computed Butler's claim in Gary Haugen's individual bankruptcy by reducing Butler's claim in the HCSI bankruptcy and then transferring the remaining balance as a claim against Haugen personally. We believe this was improper.

As we noted above, Haugen's individual liability to Butler is based upon the alter ego judgment holding him jointly and severally liable for HCSI's debts. Thus, the calculation of Butler's bankruptcy claim against Haugen should depend upon the extent to which Haugen's personal obligation to Butler has been satisfied under the law concerning satisfaction of joint obligations.

Concerning joint obligations, the Restatement (Second) of Judgments § 50(2) provides: "Any consideration received by the judgment creditor in payment of the judgment debtor's obligation discharges, to the extent of the amount of value received, the liability to the judgment creditor of all other persons liable for the loss." The comment to this section provides that "[a] payment by

one person liable for a loss reduces pro tanto the amount that the injured person is entitled to receive from other persons liable for the loss. Restatement, Second, Torts § 885(3); Restatement, Second, Contracts §§ 293, 294(3), 295(3). This rule applies even though the extent of the liability has not been conclusively determined at the time the payment is made." *Id.* at comment a. In other words, Haugen's obligation to Butler must be reduced by payments made to Butler in satisfaction of that obligation by Haugen himself, HCSI, or Minot Sand & Gravel.

In computing the extent to which Haugen's obligation to Butler has been satisfied, it is important to note that the class of plaintiffs benefited by the district court's alter ego judgment included creditors other than Butler. Obviously, Haugen's obligation to Butler cannot be satisfied by funds that went to creditors other than Butler. We cannot tell from the documents we have received whether and to what extent the proceeds from the execution sale of Haugen's property and from the Minot Sand & Gravel bankruptcy went to pay other members of the class benefited by the alter ego judgment. On remand, the bankruptcy court must exclude from the amounts deemed to satisfy Butler's judgment any proceeds of the execution sale of Haugen's personal property or the Minot Sand bankruptcy that were paid in the HCSI bankruptcy to other members of the class benefited by the class action.

Butler further claims that the bankruptcy court erred by reducing its claim against Haugen for funds that Butler secured and turned over to the HCSI bankruptcy trustee, but were then used to pay administrative expenses of the HCSI bankruptcy. In effect, Butler contends that its claim against Haugen should be reduced

only by money that it actually received from Haugen, HCSI or Minot Sand & Gravel.

Haugen responds that failure to credit its payments that went to administrative expenses in the Haugen bankruptcy toward reduction of his debt to Butler would result in Haugen paying more than he owes. Haugen claims that Butler is entitled to only one satisfaction, and that he must be required to pay the debt only once.

We agree with Haugen on general principles, but not with their application. The Restatement (Second) of Judgments provides that consideration *received* by the judgment creditor from any of the joint obligors discharges the obligation of all joint obligors to the consent of the consideration *received*. *See* Restatement (Second) Judgments § 50(2). Although Haugen and Minot Sand contributed more that $700,000 to the HCSI bankruptcy, much of that amount was not received by Butler. We conclude that only those funds actually received by Butler may be counted as reducing Haugen's obligation to Butler for purposes of calculating Butler's claim in Haugen's individual bankruptcy.

We also do not believe that this unjustly requires Haugen to "overpay" his debts. First, Haugen was held liable for all the debts of HCSI. Thus, any funds that Haugen contributed to the HCSI bankruptcy which went to pay other creditors satisfied other valid debts which Haugen owed. Second, we do not believe it is inequitable to require Haugen to bear the administrative costs of the HCSI bankruptcy, to the extent that payment of those costs reduced funds available to satisfy Haugen's obligation to Butler. The alter ego judgment is in effect a finding

that Haugen's conduct compromised HCSI's ability to pay its debts to the detriment of third party creditors. In that sense, we believe Haugen's conduct can be said to have caused those additional costs. We do not believe it is inequitable for Haugen to bear those costs.

In summary, the bankruptcy court on remand should calculate Butler's claim in Haugen's personal bankruptcy as follows: (1) the basis for Butler's claim in the Haugen bankruptcy is the alter ego judgment against Haugen, less amounts received by Butler in satisfaction; (2) Haugen's initial judgment liability is $821,159; (3) the outstanding balance on this judgment shall bear interest from September 15, 1989, to April 13, 1990, the date of Haugen's bankruptcy petition; (4) this obligation shall continue to bear interest during the pendency of Haugen's individual bankruptcy if (a) Butler is an oversecured creditor under § 506(b) of the Bankruptcy Code, or (b) Haugen is solvent; (5) in calculating the amount to which Haugen's obligation to Butler has been satisfied, the bankruptcy court shall exclude the costs of the execution sale of Haugen's personal property and reduce Haugen's obligation by only the net proceeds; and (6) Haugen's obligation to Butler shall be considered satisfied only to the extent that Butler actually received funds in satisfaction. We recognize that there is a dispute as to the amount that Butler actually received. The bankruptcy court must resolve this dispute in making its calculation of Haugen's liability to Butler.

E. Haugen's Claim for Turnover

Haugen claims on appeal that the bankruptcy court erred in denying its motion to compel Butler to turn over to the trustee in Haugen's individual bankruptcy the funds Butler conveyed to the HCSI bankruptcy trustee. This contention is without merit, and we affirm.

III. CONCLUSION

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

NO. _____

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF WARD — NORTHWEST JUDICIAL DISTRICT

Butler Machinery Co.,

Plaintiff,

vs.

Haugen Const. Inc., Gary Haugen, individually and d/b/a Haugen's Construction Service(s), Haugen(s) Construction and Haugen Construction Services,

Defendants.

JUDGMENT

CIVIL NO. 51149

(Filed Febr. 13, 1985)

The Findings of Fact, Conclusions of Law and Order for Judgment having been entered on the 13th day of February, 1985 by the Honorable Everett Nels Olson, Judge of the District Court, Northwest Judicial District, and the same having been filed in the office of the Clerk of District Court of Ward County, North Dakota,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED BY THE COURT THAT:

I.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $217,920.96 plus interest at 18% per annum computed from September 5, 1984 in the amount of $17,290.48 on the first cause of action.

II.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $106,562.00 plus interest at the rate of 20% per annum computed from January 1, 1985 (621B scraper) in the amount of $2,509.06 and in addition, the sum of $115,240.00 plus interest at the rate of 18% per annum computed from January 1, 1985 (D8K) in the amount of $2,442.05 on the second cause of action.

III.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $51,813.61 plus interest at 18% per annum computed from January 1, 1985 in the amount of $1,097.98 on the third cause of action.

IV.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $184,401.08 plus interest at 18% per annum, computed from January 1, 1985 in the amount of $3,907.64 on the fourth cause of action.

V.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $32,449.33 plus interest at 20% per annum computed from September 5, 1984 in the amount of $2,860.69 on the sixth cause of action. Butler Machinery Co. is entitled to possession of the CAT 14G, S/N 96U05135 and that the same shall be disposed of pursuant to Section 41-09-50 of the North Dakota Century Code.

VI.

The Defendants' Counterclaim is dismissed with prejudice and without costs.

VII.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. for its statutory costs and disbursements herein taxed and allowed in the sum of $93.00 making a total Judgment herein of Seven Hundred Thirty-eight Thousand Five Hundred Eighty-seven and 88/100 Dollars ($738,587.88) together with interest at the respective rates per annum in each cause of action from and since the date Judgment is entered herein.

WITNESS THE HONORABLE EVERETT NELS OLSON, JUDGE OF THE DISTRICT COURT, AT MINOT, NORTH DAKOTA THIS 13TH DAY OF FEBRUARY, 1985.

/s/ Eldore Leier
Clerk of the
District Court
By: /s/ Palma Schoenwald
Dep.

[SEAL]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA

IN RE:

HAUGEN CONSTRUCTION SERVICES, INC.,

Debtor.

Bankruptcy No. 85-05321

BUTLER MACHINERY, INC., on behalf of itself and all others similarly situated,

Plaintiff,

v.

GARY HAUGEN, individually; GARY HAUGEN, d/b/a Haugen Construction; GARY HAUGEN, d/b/a Property Investors; GARY HAUGEN, d/b/a Haugen Farms; GARY HAUGEN, d/b/a other trade names presently unknown to Plaintiff; MINOT SAND & GRAVEL, INC., a North Dakota corporation; HAUGEN DEVELOPMENT, INC., a North Dakota corporation; and XYZ Corporation, a corporation or corporations whose true identity is presently unknown to Plaintiff;

Defendants.

Adversary No. 88-7083

REPORT AND RECOMMENDATION

(Filed Jul 11, 1989)

The matter before the court is a class action adversary proceeding initiated by a Complaint filed June 22, 1988. The class consists of all of the unsecured creditors of Haugen Construction Services, Inc. (Debtor). Butler Machinery, Inc. (Butler) is the Debtor's main unsecured creditor. On January 30, 1985, Butler obtained a judgment against the Debtor which, with accrued interest, is approximately $821,159.00. In addition to Butler's claim the Debtor's schedule A-3 lists eleven other unsecured creditors with claims totalling $36,715.21. By its complaint the class seeks to hold Gary Haugen and the named defendant corporations of which he is a stockholder, liable for the debts incurred by the Debtor corporation, including Butler's judgment. Gary Haugen is the sole stockholder of the Debtor. The class alleges that the defendants were alter egos of the Debtor. The bankruptcy case underlying this adversary was originally filed as a Chapter 11 case on June 3, 1985. On October 28, 1985, the bankruptcy court ordered an examiner appointed in the case. On May 22, 1986, the case was converted to a Chapter 7 proceeding. Much of the evidence introduced by the class at trial was highlighted in the January 13, 1986, examiner's report. Plaintiff's exhibit 1.

As discussed, *infra*, this court has concluded that it has jurisdiction over this adversary as a matter related to a case under Title 11. Section 157(c) (1) of United States Code Title 28 provides that when the parties have not consented to the bankruptcy court entering a final order for judgment the bankruptcy court shall submit proposed

findings of fact and conclusions of law to the District Court for entry of final judgment. The following proposed findings and conclusions are hereby submitted to the District Court.

This case came on for trial on May 22, 1989. From the testimony and exhibits introduced at trial the court finds the following facts:

Findings of Fact

Gary Haugen has been involved in the gravel and construction businesses since 1970. He formed Haugen's Construction Services as a sole proprietorship which operated in western North Dakota on road construction and oil well projects. The business involved a large amount of heavy equipment, some of which was collateral for debts owed by Haugen personally. On January 1, 1981, Gary Haugen incorporated his business into Haugen Construction Services, Inc. All of the heavy equipment was transferred into the corporation, but the corporation did not assume all of the debts secured by the equipment. Gary Haugen was the sole shareholder of the corporation. The Debtor corporation did not at the time of its formation, or any time subsequently, issue any shares of stock. Nor was a board of directors ever elected, minutes kept, or any dividends declared. Haugen drew a salary from the Debtor for one year after its formation and then ceased drawing a salary.

Haugen was also involved in several other business enterprises. He was a fifty percent shareholder in Impact Rollers, Inc. Impact Rollers was formed to manage a patent on a piece of machinery developed by Haugen and

another individual. Impact Rollers, Inc. also neglected to issue stock shares, elect a board of directors, keep minutes or declare any dividends.

Another of Gary Haugen's enterprises was Haugen Development. This was a sole proprietorship used by Gary Haugen for his non-corporate ventures. During the time period relevant to this case the only independent business activity engaged in by Haugen Development was speculating in the precious metals market.

In February of 1982, Gary Haugen formed Minot Sand and Gravel, Inc. (Minot Sand). Like Haugen's other corporations, Minot Sand did not issue stock, elect directors, keep minutes, or declare dividends. Minot Sand was formed to acquire the assets of Atlas Sand and Gravel (Atlas) including, among other things, real estate and heavy equipment. As part of the purchase transaction Minot Sand acquired the equipment free of liens. After the purchase the Debtor used this equipment to collateralize a loan. The Debtor did not purchase the equipment from Minot Sand before encumbering it. Haugen decided to acquire Atlas because it complimented his construction business in that the Debtor used large quantities of sand and gravel.

The purchase of Atlas was partially funded by the Debtor. The Debtor made a payment of $10,000.00 as an earnest money deposit and also made the $100,000.00 down payment required by the purchase contract at the time of the sale closing. Plaintiff's exhibits 27, 28. The Debtor received no promissory notes from Minot Sand in exchange for these payments. Minot Sand financed another portion of the purchase price with the aid of a

personal guarantee from Gary Haugen. Haugen received no type of indemnity agreement from the corporation for any liability arising from the guaranty. By December 31, 1982, Minot sand had a negative net worth of $159,170. Defendant's exhibit 37.

About one year after Minot Sand purchased Atlas it built an office building on real estate acquired in the purchase. Both Minot Sand and the Debtor maintained their administrative offices in this building. The Debtor paid no rent and there was no lease agreement between the corporations for the Debtor's use of the building. Gary Haugen ran both corporations from these offices. One bookkeeper maintained the records for both companies. Haugen also acquired possession of a helicopter which he used to supervise and support distant projects for both the Debtor and Minot Sand. The Debtor paid for all of the fuel and maintenance associated with operating the helicopter. Minot Sand made no payments toward the expense of operating the helicopter. Although neither the Debtor nor Minot Sand owned the helicopter, neither corporation made any rental payments for its use.

At one point when creditors were undertaking collection actions against Minot Sand, Haugen deposited a $100,000.00 payment to Minot Sand for work on an air force base project into his personal Haugen Development account. He did this to shield it from Minot Sand's creditors. He then used this money in his personal account to operate Minot Sand until the money ran out.

The Debtor made several transfers to, and on behalf of, Gary Haugen individually. Between September of 1982 and January of 1985, the Debtor made transfers to

Haugen Development totaling $155,500.00. Plaintiff's exhibit 2, 5, 6, 7, 8. During the same time period Haugen Development transferred $58,800.00 to the Debtor. Plaintiff's exhibit 2. The Debtor also made payments to the American Bank & Trust (American) on loans held in the name of Minot Sand and Gravel and Gary B. Haugen and Janene L. Haugen. The Debtor made eight such transfers totalling $82,765.99. Plaintiff's exhibits 9, 11, 17, 18, 19, 20, 21, 24. Gary Haugen considered both the transfers to Haugen Development and the payments to American to be loans. These loans were not represented by promissory notes and the terms of the loans were that Haugen would repay them when he was able.

The Debtor also paid several life insurance premiums for insurance covering Gary Haugen and naming American as the beneficiary. American required this insurance as a condition of financing Haugen and his related entities. It is unclear from the evidence how much of the premium payments should be allocated for financing received by the Debtor. The Debtor paid the full amount of all of the premiums totalling $10,613.20 between March, 1982, and August, 1983. Plaintiff's exhibits 10, 12, 23.

The Debtor corporation paid $9,007.54 on January 23, 1981, to the Internal Revenue Service for Gary Haugen's personal income tax liability. Plaintiff's exhibit 26. This tax arose as the result of an adjustment to the amount of depreciation on construction equipment deducted by Gary Haugen when he had operated the construction business as a sole proprietorship. He was unaware of this liability at the time the Debtor was incorporated and the Debtor did not assume the liability. The Debtor also paid

Gary Haugen's personal dentist bill of $128.00. Plaintiff's exhibit 25.

When Minot Sand and the Debtor purchased goods and services from each other invoices would be prepared. The invoices would not, however, be paid. The two corporations carried the invoices to each other on their own books as accounts receivable. Similarly, when Gary Haugen used equipment or workers from either corporation for his own personal use he would be invoiced but not pay the invoices. It was also Gary Haugen's practice with regard to the Debtor to pay corporate expenses with his personal funds whenever he found it expedient. He would not seek reimbursement for these personal expenditures from the Debtor corporation.

The Debtor corporation and Minot Sand also made large intercompany monetary transfers between themselves. Between December 12, 1982, and March 15, 1985, the Debtor issued six checks totalling $38,545.50 to Minot Sand. Plaintiff's exhibits 2, 13, 3, 24, 25, 16. During the period from May 17, 1983, to May 5, 1985, Minot Sand transferred $306,647.22 to the Debtor. Plaintiff's exhibit 2. These transfers do not include the receivables generated by intercompany sales of goods and services. Plaintiff's exhibit 2. Rather, Gary Haugen considered these transfers to be loans. They were not, however, supported by promissory notes or corporate resolutions. Nor were there any specific terms regarding repayment.

In 1984, when Gary Haugen's accountants were preparing tax returns for Minot Sand for 1983, they received a batch of invoices issued by Minot Sand to the Debtor. Plaintiff's exhibit 33. These invoices totalled

$1,225,840.98. Plaintiff's exhibit 32. The accountants explained to Gary Haugen that, as the sole shareholder of both corporations, he was being whipsawed on taxable income because Minot Sand was on the accrual basis of accounting while the Debtor was on the cash basis. Thus Minot Sand had to recognize income as soon as it invoiced the Debtor. The Debtor, being on the cash basis, would not receive a corresponding taxable income deduction until it actually paid the invoices, which it never did. When Gary Haugen learned this he produced a second batch of invoices from Minot Sand to the Debtor. Plaintiff's exhibit 34. He instructed the accountants to substitute the second batch of invoices, totalling $360,940.98, for the first batch. This substitution reduced the amount of the billing from Minot Sand to the Debtor by $864,900.00. It reduced Minot Sand's reportable income by the same amount.

The Debtor also transferred $21,700.00 to Impact Rollers, Inc. Plaintiff's exhibits 2, 3, 4. These transactions were treated by Haugen as loans, although they were never evidenced by promissory notes. Haugen purchased equipment for the Debtor through Impact Rollers to take advantage of the lower Original Equipment Manufacturer (O.E.M.) prices available to Impact Rollers. Impact Rollers qualified to purchase at O. E. M. prices because it was developing a new piece of equipment. Haugen was aware, however, that Impact Rollers would lose its O.E.M. designation if it resold parts to the Debtor. He bypassed this problem by simply having Impact Rollers transfer the equipment to the Debtor without issuing an invoice. In exchange the Debtor would periodically make a "loan" payment to Impact Rollers. It is unclear from the

evidence whether these payments were a disbursement of loan proceeds from the Debtor to Impact Rollers, or whether the payments were repayments on some type of debt created by the equipment transfer. In either case the loans were not supported by promissory notes.

The transfers made by the Debtor to, or on behalf of, Gary Haugen and his related business entities may be summarized as follows:

Payee	Amount	Date	Check No.	Exhibit No.
Atlas Ready Mix & American State	$100,000.00	2-18-82	2478	27
Rasmusson Realty Trust	10,000.00	1-07-82	2247	28
Haugen Development	$ 9,500.00	3-09-84	5590	8
Haugen Development	6,500.00	11-22-82	3810	7
Haugen Development	9,000.00	10-13-82	3626	6
Haugen Development	80,000.00	9-17-82	3499	5
First American Bank & Trust	$ 5,327.00	3-28-84	5641	21
First American Bank & Trust	16,540.81	11-28-83	5229	20
American State Bank	12,285.96	10-11-83	5037	11
American Bank & Trust Co.	5,327.00	6-29-83	4610	19
American Bank & Trust Co.	10,654.00	5-05-83	4412	18
American Bank & Trust Co.	166,540.81	3-14-83	4239	17
American State Bank	3,826.85	7-27-82	3235	9
American State Bank	12,263.56	4-21-82	2741	24
Old Line Life Ins.	439.40	8-19-83	4835	12
Manhattan Nat'l Life	4,620.00	3-28-83	4293	2
Metro Life	417.00	3-28-83	4202	2
Old Line Life Ins.	401.70	11-16-82	3768	2
Metro Life Ins.	148.40	9-14-82	3451	2
Employees Mutual	735.00	9-14-82	3493	10
Old Line Life Ins.	401.70	8-17-82	3331	2
Manhattan Nat'l Life Ins.	3,450.00	3-23-82	2610	23
Internal Revenue Service	9,007.54	1-23-81	196	26
David G. Keup, D.D.S.	128.00	7-01-81	1055	25
Minot Sand & Gravel	13,000.00	3-05-85	6500	2
Minot Sand & Gravel	1,500.00	2-03-84	5458	16
Minot Sand & Gravel	45.50	5-13-83	4440	2
Minot Sand & Gravel	3,000.00	1-27-83	4066	15
Minot Sand & Gravel	15,000.00	1-12-83	4006	14
Minot Sand & Gravel	6,000.00	12-22-81	3928	13
Impact Rollers	4,000.00	6-23-84	5823	2
Impact Rollers	12,000.00	3-15-84	5607	4
Impact Rollers	5,000.00	1-17-84	5405	3
Impact Rollers	700.00	7-07-82	3144	2

BEST AVAILABLE COPY

The Debtor's books and records were deficient in several respects. With regard to all of the Debtor's transfers to, or on behalf of, Gary Haugen and Minot Sand, it is impossible to discern the nature of the payments from the Debtor's books. Plaintiff's exhibits 3-28. The payments are not designated as personal, or on behalf of Gary Haugen or Minot Sand. Moreover, since the Debtor did not maintain any general ledger system, it is impossible to tell exactly which debts it owed to whom. When the receiver prepared his report he was forced to obtain promissory note ledgers from American to determine the principal amounts owing on the Debtor's obligations, and further, to determine which of the promissory notes upon which the Debtor was making payments were actually the Debtor's obligations. Gary Haugen made no distinction between his personal funds and the funds held by his various corporations. He candidly testified that he believed that if the corporations had money he could take the money and use it wherever he needed it because he owned all of the corporations and it was all his money.

Conclusions of Law

1.

The threshold legal issue raised in this case is whether this court has jurisdiction over a suit by creditors against non-debtor third parties for recovery under an alter ego theory. At a pre-trial conference held on May 22, 1989, the court issued an oral order concluding that it did have related matter jurisdiction under 28 U. S. C. § 157(c)(1). The defendants have reasserted their jurisdictional argument in their post-trial brief. The court will

construe this post-trial argument as a motion for reconsideration of its May 22, 1989, order.

The United States Court of Appeals for the Eighth Circuit stated its test for determining whether a civil proceeding is "related" to a bankruptcy proceeding in *National City Bank v. Coopers & Lybrand*, 802 F.2d 990 (8th Cir. 1986). The Court of Appeals reasoned, "The test is whether the outcome of the civil proceeding could conceivably have any effect on the estate-whether the outcome could alter the debtor's rights, liabilities, options, or freedom of action." *Id.* at 994; *In re Titan Energy, Inc.*, 837 F.2d 325, 329 (8th Cir. 1988). In a subsequent decision the Court of Appeals concluded that the outcome of a civil proceeding to foreclose and collect a guarantee would effect the estate because if the guaranty could not be collected the money would have to come from the estate and the unsecured creditors would get nothing. *In re Dogpatch, U. S. A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987). *See In re Cassidy Land & Cattle Co., Inc.*, 836 F.2d 1130, 1132 (8th Cir. 1988).

As support for their position that the court does not have related jurisdiction the defendants rely on the case of *Wayne Film Systems v. Film Recovery Systems*, 64 B. R. 45 (N.D.Ill. 1986). In *Wayne* the District Court concluded that an alter ego lawsuit was unrelated to the bankruptcy proceedings because the creditor was seeking recovery in its own behalf and not requesting that any recovery be added to the estate nor shared with other creditors. *Id.* at 50. *Wayne* is distinguishable from the instant case in that the plaintiff in the instant case is a class composed of all of the unsecured creditors of the Debtor. This class is identical to the entities that would benefit from any

recovery made by the estate. Moreover, in light of the Eighth Circuit's broad test that a matter is related if it "conceivably" may alter a debtor's liabilities, this court would conclude that even if Butler had brought this case individually, satisfaction of its $821,159.00 judgment from assets other than estate assets would have a significant effect on the estate's liabilities. Accordingly, this adversary proceeding is related to the Debtor's bankruptcy proceeding and is within this court's jurisdiction.

2.

The defendants also re-argue their position that this adversary proceeding is barred by res judicata. The court also issued an oral ruling that res judicata does not apply in this instance at the May 22, 1989, pre-trial conference. The presentation of this argument in the post-trial brief will also be treated as a motion for reconsideration. The defendants assert that a state court has previously determined that Gary Haugen has no liability for the debts of Haugen Construction Service, Inc. in *Butler Machinery Co. v. Haugen Construction. Inc., Gary Haugen, individually and dba Haugen's Construction Service,* Civil No. 51149 (District Court, Ward County, North Dakota January 30, 1985). In that case, however, the state court only determined that Haugen had no liability for the Debtors' debts as the result of a guarantee. *Id.* at 11. The issue of whether the corporate veil should be pierced is a separate claim which was not presented to the state court and is not barred in the instant action by the doctrine of res judicata.

3.

The next defense raised by the defendants is that this action is barred by a statute of limitations. Section 28-01-16(1) of the North Dakota Century Code provides that an action based upon a contractual liability must be commenced within six years after the claim for relief has accrued. The defendants assert that this alter ego action is based upon a financing contract between Butler and the Debtor and further that the statutory time period began to run as of the date of the contract which was executed before 1982. This argument fails for several reasons. There is no contractual basis offered as a reason to disregard the corporate entity. Alter ego liability is premised upon a defendant's course of actions over a span of time. It is not liability triggered by a single event such as the execution of a contract. Hence this case is not subject to the contractual statute of limitations. Moreover, the monetary transfers which the class asserts disregarded the Debtor's corporate entity occurred between January 23, 1981, and March 5, 1985, as recently as less than four years before the class filed the instant complaint. Accordingly, the statute of limitations defense is without merit.

4.

The substantive issue in this case is whether the class may pierce the Debtor's corporate veil to reach the assets of Gary Haugen and Minot Sand. The North Dakota Supreme Court summarized the grounds necessary to justify a pierce of the corporate veil in *Hilzendager v. Skwarok*, 335 N.W.2d 768 (N.D. 1983). The court concluded:

It is the general rule that officers and directors of a corporation are not generally liable for the ordinary debts of the corporation . . . However, in *Schriock v. Schriock*, 128 N.W.2d 852, 866 (N.D. 1964), our court stated:

> ' . . . but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.'

(citations omitted)

It has also been held that factors considered significant in determining whether or not to disregard the corporate entity include: insufficient capitalization for the purposes of the corporate undertaking, failure to observe corporate formalities, non-payment of dividends, insolvency of the debtor corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and the existence of the corporation as merely a facade for individual dealings. (citations omitted).

* * *

We believe the facts in the instant case, recited earlier herein, are clearly sufficient for disregarding the corporate entity and holding the directors and officers of Holiday Air and Holiday Leasing personally liable.

The record is replete with examples of the defendants' disregard for corporate formalities. The corporate minute books of both corporations were not kept current. Many of the corporate records have disappeared. The record also

> indicates that several of the defendants were unaware of and unconcerned about their various duties as directors and officers. Funds and assets of both corporations were commingled and disbursed haphazardly.

Id. at 774.

The United States Court of Appeals for the Eighth Circuit has also had occasion to apply North Dakota law regarding piercing the corporate veil. *See Froemming v. Gate City Federal Savings and Loan Association*, 822 F.2d 723 (8th Cir. 1987). The Court of Appeals affirmed a directed verdict which held that a wholly owned subsidiary corporation was the alter ego of its parent corporation, stating:

> As in *Larson v. Unlimited Business Exchange of North Dakota, Inc.*, 330 N.W.2d 518,521 (N.D. 1983) Gate City 'was the sole owner of the corporation [and] received the sole benefit of the corporation . . . thereby becoming personally liable for the debts and obligations of the corporation' as its alter ego. Moreover, Gate City's president is the sole officer and employee of Sun Service. . . . The two companies have offices in the same building and share an identical board of directors.
>
> The observation of minimum corporate formalities is not a controlling factor in determining whether one entity is merely facade for the dealings of another. *See Jablonsky v. Klemm*, 377 N.W.2d 560, 563 (N.D. 1985) in which observation of corporate formalities did not preclude disregarding the corporate entity. . . . The observation of corporate formality and the capitalization of Sun Service should not obscure the fact

> that its corporate actions were taken in the interest of its owner, Gate City, and were dominated and directed by Gate City's board of directors and president.

Id. at 733-34.

In the instant case the Debtor did not issue shares of stock. It did not elect directors, keep minutes, or declare dividends. It also failed to maintain accounting records which were adequate to distinguish its own debts from the debts of other entities. In short, the Debtor completely neglected any type of corporate formality. The assets of the Debtor, Gary Haugen and Minot Sand were commingled without hesitation. Moreover, none of the three entities recorded the transactions in such a way as to track the transfers from and to each entity.

In the *Froemming* case the Eighth Circuit concluded that an owner was the alter ego of a corporation when corporate actions were dominated and directed by the owner in the owner's self interest. *Id.* This principle is illustrated in this case by Gary Haugen's substitution of invoices to cure the cash and accrual basis taxable income problem. He arbitrarily reduced Minot Sand's receivables and the Debtor's payables by $864,900.00. Haugen undertook this action to reduce the amount of tax liability that he personally would have to bear as sole owner of both companies through the tax liability incurred by both corporations in total. There was nothing extraordinary about each corporation's taxable income situation when viewed from the perspective of each individual corporation. It was only when the assets of the corporations and Haugen were viewed as a pool that the taxable income dilemma became apparent.

Indeed Haugen did operate his businesses as a single pool of assets. Haugen, the Debtor, and Minot Sand shared their assets between each other for the purpose of collateralizing loans as demonstrated by the Debtor's use of Minot Sand's equipment to collateralize a loan and by Gary Haugen's use of his personal property to collateralize the loan by which Minot Sand partially paid for Atlas. He undertook this action without receiving any type of indemnity agreement. The three entities also used each others assets without any type of compensation, for example, the office building and helicopter. Finally, the three entities paid each other's expenses. Haugen personally paid corporate expenses without reimbursement. Likewise the corporations paid his personal expenses, for example dental bills and life insurance. These transfers were unsupported by promissory notes and were to be repaid at an uncertain future date when the recipient was able to repay. They were more in the nature of shared assets than loan transfers between independent entities.

The pooling method of asset management used by Haugen, the Debtor and Minot Sand is further illustrated by the transaction in which a payment due to Minot Sand was deposited into Haugen's personal Haugen Development account. The Minot Sand corporation had no obligation to turn that payment over to Haugen. Likewise, Haugen had no obligation to pay Minot Sand's operating expenses from his personal account. When both entities are viewed as a single enterprise, however, it is apparent that Haugen believed that he was benefiting the entire enterprise by shielding assets from Minot Sand's creditors. From the continuing course of dealing between Haugen, the Debtor and Minot Sand, the court concludes

that the three entities operated as a single enterprise and that Haugen and Minot Sand were alter egos of the Debtor. The class has not met its burden of proving that Impact Rollers was an alter ego of the Debtor.

It would be fundamentally unfair for Gary Haugen to operate the three entities' assets as a pool for the purpose of advancing his business enterprise while at the same time insulating his personal assets and Minot Sand's assets from liability incurred by essentially the same business enterprise.

Accordingly, for the reasons stated, it is recommended that Gary Haugen personally and Minot Sand and Gravel, Inc. are jointly and severally liable for all of the debts of Haugen Construction Services, Inc. as of June 3, 1985, (the date of the Debtor's bankruptcy petition) including the following:

> Acme Electric $1,730.00; Anderson Reports $60.00; Bearing & Drives $7,724.96; Butler Machinery $821,159.00 (arising from judgment obtained in Civil No. 51149 entered in Ward County District Court); Krebsbach, Inc. $422.64; Midwest Industrial $1,425.08; Midwest Industrial $10,020.15; Northwest Equipment $707.55; Northwest Sheet & Iron Works $543.78; Rued Insurance $10,000.00; Sweeney Bros. $3,766.93; Wibe Electronics $314.12.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 11th day of July, 1989.

/s/ William A. Hill
UNITED STATES
BANKRUPTCY JUDGE

NOTICE OF ENTRY PURSUANT
TO F. R.B.P. 9022
Entered on docket 07/11/89
Copies mailed 07/11/89 to:
U.S. Trustee (information copy)
Robert S. Thomas, Minot, ND (Atty. for Gary Haugen)
Terry C. Smith, Minneapolis, MN (Atty. for Plaintiff)
Max D. Rosenberg, Bismarck, ND
(Atty. for Gary Haugen and Minot
Sand & Gravel, Inc.)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

In Re: Haugen Construction Services, Inc., Debtor.	Bankruptcy No. 85-05321
Butler Machinery, Inc., on behalf on itself and all others similarly situated, Plaintiff, vs. Gary Haugen, individually; *et al.*, Defendants.	Adversary No. 88-7083

ORDER

(Filed Sept. 15, 1989)

The above-entitled matter before the court is a review of the Bankruptcy Court's report and recommendation issued in the adversary proceeding referenced above. The Defendants have submitted objections to the report and recommendation which recommended that the Defendants Gary Haugen and Minot Sand and Gravel, Inc., be found jointly and severally liable for all the debts of Debtor Haugen Construction Services, Inc., based upon a "piercing the corporate veil" theory.

The court's review of the Bankruptcy Court's report and recommendation is *de novo*. *See* Federal Bankruptcy

Rule 9003(d). After thoroughly reviewing the record in this matter, it is the finding of this court that the Bankruptcy Courts report and recommendation is accepted in its entirety. There is ample support for the findings and conclusions set forth in the report and recommendation.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED THAT THE REPORT AND RECOMMENDATION OF THE BANKRUPTCY COURT IS ACCEPTED. LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 12th day of September, 1989.

/s/ Patrick A. Conmy
Patrick A. Conmy,
Chief Judge
United States
District Court

BK 95
(Rev. 8/83)

UNITED STATES BANKRUPTCY COURT

For the _____ District of NORTH DAKOTA

In Re: Haugen Construction Services, Inc.,
Debtor.

Butler Machinery, Inc., on behalf of itself and all others similarly situated, Plaintiff v. Gary Haugen, individually; et al., Defendant	Case No. 85-05321 Adversary Proceeding No. 88-7083

JUDGMENT

(Filed Sept. 15, 1989)

[ ] This proceeding having come on for trial or hearing before the court, the Honorable , United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

[OR]

[ ] This proceeding having come on for trial before the court and a jury, the Honorable , United States Bankruptcy Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict,

[OR]

[x] The issues of this proceeding having been duly considered by the Honorable Patrick A. Conmy, Chief Judge, U.S. District Court
~~United States Bankruptcy~~ Judge, and a decision having been reached without trial or hearing.

IT IS ORDERED AND ADJUDGED: That the Report and Recommendation of the Bankruptcy Court entered on July 11, 1989, is hereby accepted and Judgment is entered accordingly.

Entered on docket 09/15/89
Copies mailed 09/15/89 to:
U.S. Trustee
Phillip D. Armstrong
Robert S. Thomas
Terry C. Smith
Max D. Rosenberg

ELLEN A. JOHANSON
Clerk of Bankruptcy Court

[Seal of the U.S. Bankruptcy Court]

Date of issuance:
September 15, 1989

By: /s/ Angie F. Kondos
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA

IN RE:

GARY HAUGEN,
Debtor. Bankruptcy No. 90-05296

GARY HAUGEN,
Plaintiff,

v.

BUTLER MACHINERY, INC.,
Defendant. ADVERSARY No. 90-7059

REPORT AND RECOMMENDATION

(Filed Sept. 24, 1990)

This matter is before the court sua sponte to determine whether this court has subject matter jurisdiction over a pending adversary filed by the Debtor, Gary Haugen, on August 14, 1990. The defendant, Butler Machinery, Inc., filed a Motion for Summary Judgment pursuant to Bankruptcy Rule 7056 on August 31, 1990, and asserts that the defendant is entitled to judgment as a matter of law. The court on its own motion brings this matter to determine whether the court should abstain from this adversary proceeding pursuant to 28 U.S.C. § 1334(c)(1). The court is quite familiar with the facts upon which the plaintiff, Gary Haugen, bases his several legal claims. The facts necessary for the determination of this present Report and Recommendation are as follows:

Factual Background

1.

In February 1985 the defendant, Butler Machinery, Inc., (Butler), obtained a state court judgment against Haugen Construction Services, Inc., (Haugen Construction), an entity which sole shareholder was Gary Haugen. After a Chapter 11 bankruptcy petition was filed by Haugen Construction on June 3, 1986, Butler commenced an adversary proceeding to determine that Gary Haugen and his related corporate entities (*i.e.*, Minot Sand and Gravel) would be held jointly and severally liable for the debts incurred by Haugen Construction. This court issued a Report and Recommendation which was adopted by the United States District Court for the District of North Dakota on July 21, 1989, holding Gary Haugen personally, and Minot Sand and Gravel jointly and severally liable for all debts of Haugen Construction Services, Inc., *See, In re Haugen Construction Services, Inc.*, 104 B.R. 1013 (Bankr. D.N.D. 1989).

The above-mentioned federal Judgment was filed by the Clerk of the District Court, Ward County, North Dakota as a foreign judgment on December 27, 1989. A Writ of Execution was issued by the Clerk of District Court, Ward County, North Dakota on January 5, 1990. On January 23, 1990, the sheriff levied upon certain assets of Gary Haugen. These assets were sold at a sheriff's auction on March 4-5, 1990.

By Complaint filed on August 14, 1990, the Debtor, Gary Haugen, seeks monetary damages against the defendant, Butler Machinery, for an alleged excessive and

wrongful execution and levy, *inter alia*. The Debtor's allegations, by way of his Complaint, are summarized as follows:

1. That the Writ of Execution was invalid and violated the stay provisions of the North Dakota Rules of Civil Procedure and as such was an abuse of process.

2. The notice provisions of North Dakota Century Code ch. 28-20.1 are unconstitutional.

3. The Writ of Execution is voidable in that it denied the plaintiff statutory benefits and due process and equal protection rights.

4. The execution notice was improperly served pursuant to North Dakota laws.

5. The federal Judgment is not a foreign judgment pursuant to North Dakota Century Code ch. 28-20.1.

6. Butler's attempt to modify the federal Judgment by the Honorable E. Nels Olson, North Dakota District Court Judge for Ward County, by imposing liability upon Gary Haugen was a denial of due process and equal protection.

7. The levy was excessive and wrongful.

8. Butler converted property of Haugen.

9. That the plaintiff, Haugen, has suffered emotional distress.

10. In addition, Gary Haugen demands a jury trial.

Discussion

1.

Subject Matter Jurisdiction

It is well established that an issue of subject matter jurisdiction of a court may be raised sua sponte and that it is the duty of every federal court to raise the issue as a "threshold inquiry" in all federal proceedings. *In re Artic Cat Enterprises, Inc.*, 68 B.R. 71, 75 (Bankr. D.Minn. 1986); 28 U.S.C. § 1334(c)(1); *see also, In re Terracor*, 86 B.R. 671, 677 (Bankr. D. Utah 1988) (bankruptcy court may raise issue of abstention sua sponte); *see generally, Bellotti v. Baird*, 428 U.S. 132, 143 (1976) (abstention may be raised by courts sua sponte); *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557 (2nd Cir. 1978).

Pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, the bankruptcy court has no general grant of jurisdictional authority but is restricted by the provisions of 28 U.S.C. § 1334. *In re American Energy, Inc.*, 50 B.R. 175, 177 (Bankr. D.N.D. 1985). Section 1334(b) grants the District Court "original but not exclusive jurisdiction over all civil proceedings arising under or related to cases under title 11." However, there is a distinction between the authority of a bankruptcy judge in a proceeding which "arises under or in a case under title 11" and in one which is merely "related" to a case under title 11. 28 U.S.C. § 157(b)(c); *In re Craft Architectural Metals Corp.*, 115 B.R. 423, 427 (Bankr. E.D.N.Y. 1989). Section 157(b)(1) authorizes a bankruptcy judge to hear and determine "all cases under title 11 and all core proceedings arising under title 11". 28 U.S.C. § 157(b)(1); *In re Craft Architectural Metals Corp.*, 115 B.R. 423, 426

(Bankr. E.D.N.Y. 1989); *see also, In re American Energy, Inc.*, 50 B.R. 175, 178 (Bankr. D.N.D. 1985).

The term "core proceeding" is not defined by the Bankruptcy Code but courts have generally defined them as a proceeding which would not exist at law in absence of the Bankruptcy Code or "those proceedings which are integral to the core bankruptcy function of restructuring debtor-creditor rights." *In re American Energy, Inc.*, 50 B.R. 175, 178 (Bankr. D.N.D. 1985); *In re Craft Architectural Metals Corp.*, 115 B.R. 423, 427 (Bankr. E.D.N.Y. 1989). This court in *American Energy* stated:

> A common sense interpretation of the term "core" would dictate that it include only those proceedings which are specifically defined in [section 157] (b)(2)(B)-(N) or in the Bankruptcy Code itself.

In re American Energy, Inc., 50 B.R. 175, 178 (Bankr. D.N.D. 1985).

Clearly, Haugen's present adversary proceeding seeking monetary damages for excessive and wrongful levy, emotional distress, and conversion is not a core proceeding pursuant to section 157 and correlating case law. However, this does not preclude a bankruptcy judge from hearing the case and rendering proposed findings if the proceeding is otherwise "related to the case under title 11." *Id.* at 179.

For a proceeding to be "related to" a bankruptcy case for purposes of bankruptcy jurisdiction, courts require that it "have some effect on the administration of the debtor's estate." *In re Dog Patch U.S.C., Inc.*, 810 F.2d 782, 783 (8th Cir. 1987); *see also, In re American Energy, Inc.*, 50

B.R. 175 (Bankr. D.N.D. 1985) (related means that there must exist a direct relationship to the administration of the bankruptcy estate). The present adversary proceeding seeks to recover money damages for an alleged wrongful and excessive levy. A recovery in the present case would bring money into the Debtor's Chapter 11 case. Under the broad definition of "related" used by the Eighth Circuit in *In re Dog Patch, supra,* it is conceivable that the outcome of the plaintiff's proceeding could have an effect on the administration of the Debtor's estate. Therefore, the court finds that the present adversary action is a "related" proceeding.

2.

Abstention

The statutory provisions allowing for discretionary abstention are codified in 28 U.S.C. § 1334(c)(1). Pursuant to section 1334(c)(1) a bankruptcy judge may abstain from hearing a related bankruptcy proceeding "in the interests of justice or in the interests of comity with the State courts or respect for State law." *In re Titan Energy,* 837 F.2d 325, 330 (8th Cir. 1988); 28 U.S.C. § 1334(c)(1). The plaintiff's present cause of action is principally and fundamentally grounded in state law and bears a limited connection to the Debtor's present bankruptcy case. Haugen's principal claim stems from an alleged invalid filing of a Writ of Execution and subsequent wrongful and excessive levy by the defendant, Butler Machinery. The plaintiff's basis for these allegations are North Dakota Century Code ch. 28-20.1 [Enforcement of Foreign Judgments] and Rule 62(a) of the North Dakota Rules of

Civil Procedure. Moreover, the plaintiff asserts that the North Dakota statutes, specifically 28-20.1 are unconstitutional and violative of due process and equal protection guarantees. While initially the defendant had a federal judgment, such judgment was filed with the Ward County District Court for execution and levy. It is this court's opinion that the plaintiff's allegations are primarily based upon state court actions and state law and therefore, are properly decided in a state forum. Where a court proceeding sounds in state law and bears a limited connection to a debtor's bankruptcy case, abstention is particularly compelling. *In re Titan Energy*, 837 F.2d 325, 332 (8th Cir. 1988) citing *In re Futura Industries, Inc.*, 69 B.R. 831, 835 (Bankr. E.D.Pa. 1987).

Furthermore, the Debtor filed with his Complaint a demand for a jury trial. Without deciding the question of whether a debtor is entitled to a jury trial in this adversary proceeding, the Eighth Circuit has held that bankruptcy courts are without the statutory authority to conduct such jury trials. *In re United Missouri Bank of Kansas City*, 901 F.2d 1449, 1454 (8th Cir. 1990).

In addition, because of the early nature of this adversary proceeding, no answer has been filed and the parties have not engaged in any discovery. Hence, neither party will be prejudiced by the court exercising its discretion to abstain.

Accordingly, because this adversary proceeding is primarily based upon state law and could be economically and properly adjudicated in a state forum and since the claims are only incidentally related to the present bankruptcy proceeding, the bankruptcy court ought to

abstain. Therefore, this court respectfully recommends the District Court enter an order abstaining pursuant to 28 U.S.C. § 1334(c)(1) from a resolution of this present adversary proceeding between Gary Haugen and Butler Machinery.

Dated this 24th day of September, 1990.

/s/ William A. Hill
WILLIAM A. HILL
UNITED STATES
BANKRUPTCY JUDGE

NOTICE OF ENTRY PURSUANT TO F.R.B.P. RULE 9022.

Entered on docket 09/24/90 and copies mailed 09/24/90 to:
U.S. Trustee (Minneapolis, MN)
Robert S. Rau (Minot, ND, Attorney for Plaintiff)
James Levy (Minneapolis, MN, Attorney for Defendant)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

In Re:

Gary Haugen,
Debtor,

Bankruptcy No. 90-05296

Gary Haugen,
Plaintiff,

Adversary No. 90-7059

v.

Butler Machinery, Inc.,
Defendant.

ORDER
(Filed
Oct. 18, 1990)

Before the court is a review of the Bankruptcy Court's Report and Recommendation issued in relation to the adversary proceeding referenced above. The Bankruptcy Court's recommendation is that it abstain from hearing the current adversary proceeding because the issues raised concern primarily state law. The parties have objected to the Bankruptcy Court's recommendation. Plaintiff suggests that this court hear the case.

After a review of the Bankruptcy Court's Report and Recommendation and the file, the court finds abstention is appropriate. Therefore, pursuant to Rule 9033 of the Federal Bankruptcy Rules, the Bankruptcy Court's Report and Recommendation is hereby adopted and Plaintiff's

case against the Defendant is dismissed without prejudice to its refiling in the appropriate state court.

Dated this 18th day of October, 1990.

/s/ Patrick A. Conmy
Patrick A. Conmy,
Chief Judge
United States
District Court

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF WARD — NORTHWEST JUDICIAL DISTRICT

Gary Haugen,

Plaintiff,

vs.

Butler Machinery, Inc.,

Defendant.

MEMORANDUM OPINION

Civil No. 90-1147

On January 30, 1985, this Court issued its Memorandum Opinion in District Court Civil No. 51149 wherein judgment was awarded in favor of Butler Machinery Co. and against Haugen Const. Inc. in the sum of $593,146.88 plus accrued interest. At the same time, Butler's action against Gary Haugen, individually, on a personal guaranty, was dismissed.

Haugen Construction filed a petition in bankruptcy on June 3, 1985. In 1989, Butler commenced an adversary proceeding in Bankruptcy Court against Haugen and his alter egos which resulted in the following recommendation on July 11, 1989, by the bankruptcy judge:

> " . . . it is recommended that Gary Haugen personally and Minot Sand and Gravel, Inc. are jointly and severally liable for all of the debts of Haugen Construction Services, Inc. as of June 3, 1985 (the date of the Debtor's bankruptcy petiton) including the following: . . . Butler Machinery $821,159.00 (arising from judgment obtained in Civil No. 51149 entered in Ward County District Court);"

A U. S. District Court Judgment adopting the recommendations of the Bankruptcy Judge was docketed on September 15, 1989.

The federal judgment was then filed as a part of Ward County District Court Civil No. 51149 as a foreign judgment pursuant to 28-20.1 N.D.C.C. The initial inquiry is whether a Federal District Court Judgment can be filed as a foreign judgment.

DEFINITION OF FOREIGN JUDGMENT

Chapter 28-20.1 N.D.C.C. governs the enforcement of foreign judgments. Chapter 28-20.1-01 defines "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state."

The North Dakota Supreme Court has held that this language refers to Article IV, Section of the United State Constitution. *Medical Arts Building Limited v. Eralp,* 290 N.W.2d 241, 246 (N.D. 1980). Haugen contends that the full faith and credit provision of the United State Constitution is only applicable to state court judgments.

The Iowa Supreme Court considered the same argument in construing a statute identical to that of North Dakota:

> "We believe the plain meaning of 'a judgment . . . of a court of the United States' includes federal district court judgments." *Bechtel v. Western Contracting,* 414 N.W.2d 130, 131 (Iowa 1987).

The concept of full faith and credit was expanded by the enactment of 28 USCA 1738 (formerly 28 USCA 687). The U. S. Supreme Court has held that:

> "Under it the judgments and decrees of the Federal Courts in a state are declared to have the same dignity in the courts of that state as those of its own courts and in a like case and under similar circumstances." *Stoll v. Gottlieb,* 305 U.S. 165, 59 S.Ct. 134 (1938).

State courts have reached similar results:

> "The judgments of federal district courts, although of limited jurisdiction, stand upon the same footing as those of state courts of general jurisdiction, and are entitled to the full faith and credit applicable to the judgments of state courts." *Dickson v. Patterson,* 189 P. 912 (Kansas 1920).

> "The constitutional requirement in regard to full faith and credit to be given to judgments is applicable to a decree of federal courts in the same manner as to decrees of state courts." *Hayes v. Payne Invest. Corporation,* 254 N.W. 684, 686 (Nebraska 1934)

> "The purpose of the full faith and credit clause is to integrate and unify the nation by according finality to a prior final judgment issued by another state or federal court." *Mitchell v. Pincock,* 577 P.2d 343 (Idaho 1978).

> "Full faith and credit must be given to a final order or judgment of a federal court." *Levy v. Cohen,* 561 P.2d 252 (Ca. 1977).

Rule 54(a), N.D.R.Civ.P., defines a "judgment" to include "a decree or any order from which an appeal

lies." I conclude that the bankruptcy court judgment complies with the term "judgment" as defined by the North Dakota Rules of Civil Procedure and that as a judgment of Federal District Court, it is entitled to full faith and credit thereby coming within the definition of a "foreign judgment" as set forth under N.D.C.C. 28-20.1-01.

NOTICE OF FILING

Haugen contends that improper notice voids the filing and execution. On December 27, 1989, the Ward County Clerk of District Court mailed notice of the filing to:

> "Gary Haugen and Minot Sand and Gravel
> 5100 South Broadway
> Minot, ND".

An execution was issued on January 5, 1990, and returned, along a partial satisfaction on March 26, 1990. The partial satisfaction included the proceeds from sheriff's sales conducted on March 2 and 3, 1990, as well as on March 7, 1990.

Another execution was issued on March 26, 1990, and was returned wholly unsatisfied on May 18, 1990.

Haugen took no action until November 8, 1990, when he commenced his present action requesting punitive damages and injunctive relief.

28-20.1-03(2) N.D.C.C. provides that:

> "promptly upon the filing of a foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given . . . "

28-20.1-03(3) N.D.C.C. provides:

> "No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until ten days after the date the judgment is filed."

The Clerk of Court's stamp indicates that the U. S. District Court Judgment was filed on December 26, 1989. Notice of the filing was made on December 27.

The date of filing should have been excluded in computing the time for issuing the execution. Therefore, the tenth day would have fallen on January 5 – the date of issuance. The execution was therefore issued one day early.

The notice requirements of N.D.C.C. 28-20.1-03(3) is to provide an opportunity to request a stay pursuant to N.D.C.C. 28-20.1-04 in the event that an appeal from the foreign judgment is pending or will be taken. No appeal has been made of the U. S. District Court Judgment. Although an error was made in issuing the execution one day early, the mistake was of no consequence in this case.

Haugen next complains that he never received notice of the filing because notice had been sent to the wrong address. The Affidavit of Identification furnished by Butler's attorney was apparently based upon information taken from the NSP telephone directory which listed a street address for Haugen's Construction but no street address for Gary Haugen:

> "Haugen's Construction 5100 S. Bdwy. .852-4884
> Haugen, Gary..... 839-1832"

28-20-15 N.D.C.C. requires the listing of the debtor's street addresss "to the best of affiant's information and belief". For whatever reason, Gary Haugen chose not to list his street address or mailing address in the telephone directory. The manner of listing would lead one to conclude that correspondence directed to Gary Haugen at his business address would reasonably be calculated to come to the attention of Gary Haugen.

The affidavit of Deputy Kenneth Alexander also indicates that, on January 23, 1990, Gary Haugen was personally served with a notice of levy. Alexander's affidavit also indicates that additonal notices of levy were personally served on Gary Haugen. Haugen does not deny that he was personally served. However, Haugen indicates that he was confused as to whether the levy was against property owned by Haugen Construction or by Gary Haugen individually. Judge Hill's detailed findings as to Haugen's co-mingling of assets sheds some light on why Haugen may possibly have become confused. I find no merit to either Haugen's contention of insufficient notice or lack of notice.

AMOUNT OF JUDGMENT

Rule 58 N.D.R.Civ.P., requires that "if the judgment directs the payment of money in a sum certain, or which by calculation could be made certain, the clerk shall also docket the judgment in the judgment docket as provided by law."

The District Court Judgment filed on September 15, 1989, provided:

> "It is ORDERED AND ADJUDGED: that the Report and Recommendation of the Bankruptcy Court entered on July 11, 1989, is hereby accepted and Judgment is entered accordingly."

The Bankruptcy Judge's report said that, as of June 3, 1985, Gary Haugen was personally liable for the debts of Haugen Construction Services, Inc., including the obligation of Butler Machinery in the sum of $821,159.00 arising from the Judgment obtained in Civil No. 51149 entered in Ward County District Court.

It is Butler's contention that the Bankruptcy Judgment, when considered with the Ward County District Court Judgment, established with certainty the amount owed as well as from whom it was owed.

A final Judgment for money must determine, or specify the means for determining, the amount due. *United States v. Schaeffer Brewing Company,* 356 U.S. 227, L.Ed.2d 721, 78 S.Ct. 674 (1958). The Bankruptcy Court Judgment is not void. Neither is the Ward County District Court Judgment void. The issue is whether, taken together, the Judgments can serve as a basis for issuing an execution. I can find no case in point which directly supports Butler's contention. I conclude that an execution as to Gary Haugen individually cannot properly issue.

ISSUES ADJUDICATED

The Judgment issued in Ward County District Court Civil No. 51149 was based on certain transactions dating back to the early 1980s. Butler Machinery Co. did not contend, as a part of Civil No. 51149, that the corporate shield of Haugen Construction Service should be pierced

as a theory for recovery against Gary Haugen individually.

Haugen's attorney did raise the statute of limitations question in the Bankruptcy Court. The Bankruptcy Judge ruled that the adversarial proceedings were not subject to the contractual statute of limitations, but instead, were based on alter ego liability which was premised upon Haugen's "course of action over a span of time". Although the ruling does not state *why* the Bankruptcy Court avoided the contractual statute of limitations issue, I can only surmise that the nature of the bankruptcy proceedings did not require that he do so. If the limitations issue was not required to be addressed, there could have been no basis for appeal of that issue. The contractual statute of limitations cannot be circumvented by retro-application of a Bankruptcy Court Judgment premised upon alter ego liability.

CONCLUSION

Gary Haugen is entitled to relief pursuant to Rule 60(b)(vi) through either motion or an independent action. The one year limitation provided in the court rule only applies to specific subsections of the rule. In this case I find that, under the circumstances, Haugen has brought this matter to the attention of the Court within a "reasonable" time. Notwithstanding a determination that Haugen brings this matter to the Court's attention within a reasonable time, his delay may be such that a fact finder could conclude that Haugen should bear ultimate responsibility for certain collection costs incurred by Butler. Furthermore, the Court has only been asked to rule on

the issue of whether the combined judgments of the State and Federal Courts can serve as the basis for issuance of an execution against Gary Haugen, individually. For those reasons, any issues relating to reimbursement or a return of funds will not be made at this time. Accordingly, it is my decision that (1) any outstanding writs of execution against Gary Haugen, individually, be vacated, and that (2) any further proceedings against Gary Haugen individually and arising out of Ward County Civil No. 51149 be stayed until further Order of this Court. Counsel for Haugen is invited to prepare a formal Order for the Court's consideration.

Dated at Minot, North Dakota, this 8th day of August, 1991.

BY THE COURT:

/s/ Everett Nels Olson
EVERETT NELS OLSON
District Judge

cc: Robert S. Rau
Michael G. Sturdevant

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA

IN RE:

HAUGEN CONSTRUCTION SERVICES, INC.,

Debtor.

Bankruptcy No. 85-05321

BUTLER MACHINERY, INC., on behalf of itself and all others similarly situated,

Plaintiff,

v.

GARY HAUGEN, individually; GARY HAUGEN, d/b/a Haugen Constitution; GARY HAUGEN, d/b/a Property Investors; GARY HAUGEN d/b/a Haugen Farms; GARY HAUGEN, d/b/a other trade names presently unknown to Plaintiff; MINOT SAND & GRAVEL, INC., a North Dakota corporation; HAAGEN DEVELOPMENT, INC., a North Dakota corporation; and XYZ Corporation, a corporation or corporations whose true identity is presently unknown to Plaintiff;

Defendants.

Adversary No. 88-7083

ORDER
(Filed Nov. 13, 1991)

Butler Machinery, Inc., the plaintiff in the above-captioned adversary proceeding (reported at 104 B.R.

1013 (D.N.D. 1989)), by Motion filed October 10, 1991, asks this court to enter judgment concluding the class action. The motion is premised upon Rule 23(c) of the Federal Rules of Civil Procedure.[1]

Specifically Butler asks that the judgment state that the case is a class action, and that Butler is entitled to judgment in the total amount of $841,560.18 as of September 30, 1991, plus interest at the North Dakota legal rate from September 30, 1991, to the date of entry of judgment.

What seems to be obscured by the cacophonous arguments is that the judgment previously entered in this adversary on September 15, 1989, while perhaps not as detailed as later events prove, was nonetheless a judgment in an action maintained as a class action under Rule 23. The complaint itself sets the case up as a class action and the court at all times regarded as such. In the very opening sentence of its July 11, 1989, opinion, it stated, "The matter before the court is a class action . . . the class consists of all of the unsecured creditors of Haugen Construction Services, Inc.."

Preparatory to discussing the judgment further, it is helpful to briefly recall the events giving rise to the adversary proceeding and resulting judgment.

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[1] A related issue regarding the nature and amount of Butler's claim as a claim against the estate of Gary Haugen is separately raised in that case and is addressed by separate memorandum in that case (Bky. No. 90-05296).

Gary Haugen, who is now deceased, was the principal of a construction company known as Haugen Construction Services, Inc., (Haugen Construction). In 1985 Butler brought a civil action in North Dakota State District Court against Haugen Construction and Gary Haugen individually on a number of recovery theories. (North Dakota Civil No. 51149) On February 13, 1985, judgment was entered in Civil No. 51149 as follows:

I.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $217,920.96 plus interest at 18% per annum computed from September 5, 1984 in the amount of $17,290.48 on the first cause of action

II.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $106,562.00 plus interest at the rate of 20% per annum computed from January 1, 1985 (621B scraper) in the amount of $2,509.06 and in addition, the sum of $115,240.00 plus interest at the rate of 18% per annum computed from January 1, 1985 (D8K) in the amount of $2,442.05 on the second cause of action.

III.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $51,813.61 plus interest at 18% per annum computed from January 1, 1985 in the amount of $1,097.98 on the third cause of action.

IV.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $184,401.08 plus interest at 18% per annum, computed from January 1, 1985 in the amount of $3,907.64 on the fourth cause of action.

V.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. in the sum of $32,449.33 plus interest at 20% per annum computed from September 5, 1984 in the amount of $2,860.69 on the sixth cause of action. Butler Machinery Co. is entitled to possession of the CAT 14G, S/N 96U05135 and that the same shall be disposed of pursuant to section 41-09-50 of the North Dakota Century Code.

VI.

The Defendants' Counterclaim is dismissed with prejudice and without costs.

VII.

Butler Machinery Co. is entitled to Judgment against Haugen Const., Inc. for its statutory costs and disbursements herein taxed and allowed in the sum of $93.00 making a total Judgment herein of Seven Hundred Thirty-eight Thousand Five Hundred Eighty-seven and 88/100 Dollars $($738,587.88) together with interest at the respective rates per annum in each cause of action from the since the date Judgment is entered herein.

The aggregate total up to the date of the state judgment including pre-judgment interest was $738,587.88.

On June 3, 1985, Haugen Construction filed for relief under Chapter 11 and in its schedule of liabilities listed Butler as an unsecured creditor with a claim of $821.159.00 emanating out of the state court judgment. The case was subsequently converted to a Chapter 7 on May 22, 1986. After considerable litigation, Butler was allowed to file a formal proof of claim and on March 7, 1988, did file a formal proof of claim against Haugen Construction for the sum of $821,159.00.

The instant adversary proceeding was commenced in June 1988 after the proof of claim had been filed. What is important to keep in mind here is that the adversary proceeding was not a hearing on the nature, amount or validity of the claim itself, rather it was brought as a related proceeding[2] seeking to have Gary Haugen, as an officer of Haugen Construction, held personally liable for the debts of the Debtor, Haugen Construction. Gary Haugen himself subsequently filed for relief under Chapter 11 on April 13, 1990.

This court in reaching its decision in the instant case discussed both the res judicata effect on the 1985 state court case as well as the question of whether the alter ego case was barred by the North Dakota statute of limitations. It was determined that the action was neither

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[2] Because the defendant, Gary Haugen, was not at the time a debtor in bankruptcy, the court regarded the adversary as a "related proceeding" under 28 U.S.C. § 157(c)(1) requiring entry of final judgment by a U.S. district judge.

barred by the doctrine of res judicata nor the statute of limitations. Gary presently charges that in its memorandum, this court did not incorporate the state court judgment and that nothing in the resulting federal judgment noted Gary as personally liable for the state judgment. This is incorrect. The court's judgment entered on September 15, 1989, states:

> That the Report and Recommendation of the Bankruptcy Court entered on July 11, 1989, is hereby accepted and Judgment is entered accordingly.

The foregoing Judgment language is taken from U. S. District Judge Conmy's Order of September 15, 1989 *accepting in its entirety* the bankruptcy court's report and recommendation. The report and recommendation, in the last paragraph provides as follows:

> [I]t is recommended that Gary Haugen personally and Minot Sand and Gravel, Inc., are jointly and severally liable for all of the debts for Haugen Construction Services, Inc., as of June 3, 1985 (The date of the Debtor's bankruptcy Petition) including the following: . . . Butler Machinery, $821,159.00. (Arising from Judgment obtained in Civ. No. 51149 entered in Ward County District Court) . . .

Nothing could be more clear. Gary was to be personally liable for all the *debts* of Haugen Construction as they existed on June 3, 1985. As of that date, Butler had a claim against Haugen Construction emanating from the state court judgment and that claim was not listed in the schedules as either disputed or contingent. Although the

report and recommendation referred to "debt", a debt is defined in 28 U.S.C. § 101 as a liability on claim.

At the time judgment was rendered in the instant case, Butler had been listed as an unsecured creditor with a $821,159.00 claim and had, by that time, filed a proof of claim for that amount.

The alter ago decision did not conclusively establish the amount of the claim because the nature of the action was not an objection to claim under section 502(b) nor had the time yet run for the trustee to raise an objection.

A proof of claim, once filed under bankruptcy law, is prima facie evidence of the validity and amount of the claim (see Rule 3001 Federal Rules of Bankruptcy Procedure) and will be deemed *allowed* under 28 U.S.C. § 502(a) *unless* an objection is made and the court makes a determination. The Butler proof of claim filed in Haugen Construction was never objected to and the trustee in the converted Chapter 7 filed a final report on July 25, 1991, noting Butler's claim as allowed in the sum of *$821,159.00.*

Because Butler was an undersecured creditor, its claim in the Haugen Construction case was not entitled to carry any interest beyond the date of the Haugen Construction filing. The debt of Haugen Construction to Butler was fixed at $821,159.00

This is what Gary, as a result of the alter ego Judgment was liable for – "all of the debts of Haugen Construction Services, Inc. as of June 3, 1985." There is nothing more to be done in the context of this court's report and recommendation nor the resulting judgment.

Taken together as they must be, Rule 23(3) is satisfied by the judgment entered on September 15, 1989.

Accordingly, the Motion is DENIED.

SO ORDERED.

Dated this 13th day of November, 1991.

/s/ William A. Hill
WILLIAM A. HILL, JUDGE
U. S. BANKRUPTCY COURT

NOTICE OF ENTRY PURSUANT
TO F.R.B.P. 9022
Entered on docket 11/13/91
Copies mailed 11/13/91 to:
U.S. Trustee
Max D. Rosenberg, Atty. for Debtor
Robert Rau, Atty. for Debtor✓
John Petrik, Atty. for Westlie Motor Co.
James Levy, Atty. for Butler Machinery
Terry C. Smith, Atty. for Butler Machinery
Clare Hochhalter, Atty. for USA/IRS

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA

IN RE:

GARY HAUGEN,

Debtor.

Bankruptcy
No. 90-05296

MEMORANDUM AND ORDER
(Filed Nov. 13, 1991)

The Debtor, Gary Haugen (Gary), through his personal representatives and by objection filed November 19, 1990, objects to the claim of Butler Machinery, Inc., filed June 18, 1990, and by separate motion filed September 27, 1991, asks the court to dismiss Butler's claim completely and direct it to turn over all funds in its possession. In essence, the parties are in substantial disagreement over the amount of Butler's claim. Accordingly, the court will treat these jointly as a request to determine the amount of Butler's claim against Gary.

Gary Haugen, now deceased, was the principal officer of a construction company known as Haugen Construction Services, Inc. (Haugen Construction), which filed for relief under Chapter 11 on June 3, 1985, later converting to a Chapter 7 on May 22, 1986 (Bky. Case No. 85-05321).

Gary Haugen himself filed the instant case seeking relief under Chapter 11 on April 13, 1990, and in his schedules listed Butler as a holder of a judgment in the amount of $700,000.00 (Bky. Case No. 90-05296).

On June 18, 1990, Butler filed a proof of claim in the amount of $1,000,000.00 stemming from a bankruptcy court-litigated alter ego action in the Haugen Construction case where Gary was held to be jointly and severally liable along with Minot Sand and Gravel, Inc. for all debts of Haugen Construction Services, Inc. as of June 3, 1985 (the date of the Haugen Construction bankruptcy petition) including the following: . . . Butler Machinery $821,159.00 (arising from judgment obtained in Civil No. 51149 entered in Ward County District Court). *See In re Haugen Const. Services, Inc.*, 104 B.R. 1013 (D.N.D. 1989).

An amended proof of claim was subsequently filed by Butler on January 15, 1991, in the sum of $1,835,364.93 which amount was inclusive of Westlie Motors' claim of $423,555.00 which has been compromised by separate agreement between Gary and Westlie Motors. This reduces the proof of claim to $1,411,809.93 as of April 12, 1990. Presently, accordingly to Butler's calculations it is still owed principal of $706,451.71 plus interest since March 19, 1990 through September 30, 1991 of $135,108.47 for a total of $841,560.18 with interest continuing.

Gary, on the other hand, believes Butler has completely miscalculated its claim and charges that after making the appropriate credit deductions that Butler has received everything its entitled to, if indeed its entitled to anything at all, and excess funds should be returned to him.

Before discussing the parties' respective claim calculations, several component events should be noted.

First, Butler filed the alter ego adversary judgment in Ward County, North Dakota as a foreign judgment and

obtained a writ of execution against Gary personally. The Sheriff of Ward County conducted an execution sale by means of several auctions and a livestock sale, all of which were concluded prior to Gary filing his own Chapter 11 petition. The gross income from the execution was $586,870.88 with sale costs of $78,826.05 and sheriff's commissions of $5,943.71 resulting in a net of $502,641.12 which Butler turned over to the trustee together with interest.

Secondly, on June 21, 1990, Butler filed an involuntary Chapter 7 petition against Minot Sand and Gravel, Inc., Gary's co-defendant in the adversary proceeding. The involuntary petition (Bky. Case No. 90-05509) was precipitated by the existence of an account receivable in the sum of $165,000.00 stemming from the settlement of a federally venued lawsuit entitled; *USA fbo Minot Sand and Gravel, Inc. v. Santa Fe Engineers, Inc.*, (Civil No. A4-88-214). After hearing, the settlement proceeds were used in part to pay attorneys fees and expenses of $33,410.66 with the balance of $131,589.34 deposited into court pending further order. The trustee for Haugen Construction Services, Inc. (Bky. No. 85-05321) moved for turnover of this sum on the grounds that, as a consequence of the alter ego judgment, the debts of Haugen Construction became those of Minot Sand and Gravel. After notice and hearing the clerk was directed to disperse the monies to the trustee and on August 23, 1990, the trustee received $131,589.34.

Butler takes the view that interest continued to run on its claim against Haugen Construction without interruption despite the event of its Chapter 11 filing and the

later filing by Gary. Its calculation begins with the original state court judgment of $738,587.88 upon which interest has been calculated from February 15, 1985 (the date of judgment entry) at the North Dakota legal rate to March 19, 1990, the date it received the $502,641.12 execution payment. Interest from February 15, 1985 through March 1990 is calculated at $470,504.95 for a total due as of March 19, 1990 of $1,209,092.83 from which is deducted the $502,641.12. Butler credited the $502,641.12 first against interest which reduced the principal by $32,136.17 which, as of March 20, 1990, left a principal due of $706,451.71 upon which it continued to compute interest at the legal rate to September 30, 1991, of $135,108.47 bringing the total due (according to its calculations) to $841,560.18 with interest continuing.

Gary takes the position that Butler is not entitled to any interest subsequent to the date of Haugen Construction's bankruptcy filing because Butler was undersecured in the Haugen Construction bankruptcy. Section 506(b) of the Bankruptcy Code permits post-petition interest to accrue only on claims which are oversecured. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 1030 (1989). Butler argues, however, that because Gary was held to be liable for all of Haugen Construction's debts that there has been a form of claim amalgamation with the claim against Haugen Construction becoming a claim against Gary, unfettered by the event of Haugen Construction's own bankruptcy filing or its own limited assets-assets which taken alone, would leave Butler undersecured but which, when buttressed by Gary's own

considerable assets, leave it oversecured and thus amendable to continuing interest. The court disagrees with Butler's view. Butler's claim against Haugen Construction, a claim for which Gary was later held responsible, was determined and fixed in the Haugen Construction case. It did not take on new life by the events of the later alter ego judgment. All that judgment did was to render Gary and Minot Sand and Gravel jointly and severally liable for the claim against Haugen Construction – *as established in that case.* This means it carried no interest from and after the date of Haugen Construction's filing. The claim was fixed at $821,159.00 as set forth in the proof of claim – an amount which was never objected to in the Haugen Construction case and an amount which was recognized and allowed by the Chapter 7 trustee.

Subsequent to Haugen Construction's filing but prior to Gary's own Chapter 11 filing, the claim was reduced by the levy on the alter ego judgment. The Haugen Construction claim should have been reduced by the aggregate amount of the $586,870.88 recovery without deduction for sheriff's fee or other sale costs. Thus as of the date of Gary's filing on April 13, 1990, the balance due on the Haugen Construction claim was $234,288.12. Because the liability for the Haugen Construction claim was joint and several between Gary and Minot Sand and Gravel, credit should also have been given for the $131,589.34 recovery by Butler on behalf of the creditors from Minot Sand and Gravel. This reduced the claim to $102,698.78. This balance carries no interest because it is a *derivative* claim which was fixed in the Haugen Construction case not in the Gary Haugen case.

Accordingly, Butler's claim against Gary Haugen in case no. 90-05296 derived from the judgment in *Butler Machinery, Inc. v. Gary Haugen, et al,* adv. no. 88-7083 is allowed in the sum of $821,159.00 less credits of $718,460.22, leaving a balance due of $102,698.78 with no interest accruing.

The motion by Gary Haugen for dismissal of Butler's claim and turnover is **DENIED.**

SO ORDERED.

Dated this 13th day of November, 1991.

/s/ William A. Hill
WILLIAM A. HILL, JUDGE
U.S. BANKRUPTCY COURT

NOTICE OF ENTRY PURSUANT TO BANKRUPTCY RULE 9022.
Entered on docket 11/13/91 and copies mailed 11/13/91 to:
U.S. Trustee (Minneapolis, MN)
Max D. Rosenberg
(Attorney for Debtor; Bismarck, ND)
Robert Rau (Attorney for Debtor; Minot, ND)
John Petrik (Attorney for Westlie Motor Company; Minot, ND)
James Levy (Attorney for Butler Machinery; Minneapolis, MN)
Terry C. Smith (Attorney for Butler Machinery, Minneapolis, MN)
Clare Hochhalter (Attorney for USA/IRS; Bismarck, ND)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

District Court File No. A4-91-225

IN RE:

GARY HAUGEN,
Debtor.

Bankruptcy
No. 90-05296

IN RE:

HAUGEN CONSTRUCTION
SERVICES, INC.,
Debtor.

Bankruptcy
No. 85-05321

BUTLER MACHINERY CO., INC.,
on behalf of itself and all others
similarly situated,

Plaintiff,

vs.

GARY HAUGEN, *et al.*,

Defendants.

Adversary
No. 88-7083

MEMORANDUM AND ORDER
(Filed Jun 22, 1992)

These consolidated bankruptcy appeals arise from the business operations of Gary Haugen, who purported to operate through several corporation, but who actually ran them all as sole proprietorships without much regard for the distinctions between companies and himself personally.

Mr. Haugen is since deceased.

In a series of actions both in state court and through the bankruptcy court, determinations regarding debts of the various business entities have been made and decisions rendered subjecting virtually all Haugen's assets subject to execution in satisfaction of the judgments and claims.

With this extremely complex background, the issues presented on this appeal are not complex despite the apparent attempts of counsel to cloak them in obscurity.

Creditors, using state court process, executed upon assets and had them sold at sheriff's sale. The sale realized gross proceeds and after expenses of sale were deducted, realized net proceeds. Is the debtor entitled to credit for the gross sale proceeds or the net sale proceeds? Bankruptcy Judge Hill determined that the fees and expenses paid to the sheriff are not property deducted as expenses of administration, and held that the gross amount realized should be applied against the debt of the Haugen entities.

The major amount in controversy concerns the accrual of interest on the underlying judgment debt. If interest accumulation is determined to have stopped with the initial bankruptcy rather than with the final access to Haugen's personal assets, then the creditors' claims are virtually satisfied. If interest continues to run, then some $700 thousand remains due to creditors. Judge Hill found that the entire mess constitutes one proceeding and that bankruptcy principles and common sense require a finding that creditors are not entitled to a claimed interest

accrual from and after the filing date of the first of the related bankruptcy filings.

This Court sees no need to attempt to reinvent the wheel, and **ADOPTS** the finding and logic of Judge Hill; therefore,

The appeal is DISMISSED.

Dated June 22, 1992, at Bismarck, North Dakota.

/s/ Patrick A. Conmy,
PATRICK A. CONMY,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 22 day of June 1992.

EDWARD J. KLECKER, CLERK

By: /s/ Deborah Thomas
Deputy

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2581/2632NDBI	*	Order Denying
	*	Petition
Butler Machinery, Inc., etc.,	*	for Rehearing and
Appellant,	*	Suggestion for
	*	Rehearing
vs.	*	En Banc
Gary Haugen, etc., et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

September 8, 1993

Order entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit